NO. 48378-5

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

DONNA ZINK, Appellant/Cross-Respondent

v.

PIERCE COUNTY, Respondent/Cross-Appellant

and

JOHN DOES, Respondents

Brief of Respondent/Cross-Appellant Pierce County

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I. INTRODUCTION

This is a consolidated PRA matter, which comes before this court after the grant of permanent injunctions prohibiting release of sex offender records and the grant of summary judgment of crossclaims filed by Zink alleging PRA violations. This brief will first address the granting of Pierce County's Motion for Permanent Injunction enjoining all juvenile records. Then the brief will analyze the court's granting of Pierce County's Motion for Summary Judgment on Zink's Counterclaims. Finally, this brief will address the granting of the *John Doe*'s permanent injunctions based on the legal conclusion that RCW 4.24.550 acts to exempt production of sex offender registration records, and the trial court's ruling that SSOSA and SSODA records held by a county sheriff are exempt from production under the Health Care Information Act absent a sex offender's consent to release of the records, issues for which Pierce County is an appellant.

II. ISSUES PERTAINING TO APPELLANT ZINK'S ASSIGNMENTS OF ERROR

1. Did the trial court properly grant the injunction prohibiting blanket release of juvenile records where RCW 13.50.050 provides that all juvenile records other than those in the juvenile court file are confidential? (Appellant's Assignment of Errors 1.i (22-23), 5.c,e, i. (5-7), j (1-2), k, l (13-14), n (6-8)).

2. Did the trial court properly grant summary judgment and dismiss Zink's crossclaims under the PRA where (1) third party notice was properly given under RCW 42.56.540 and PCC; (2) production was not final and there is no requirement to produce exemption logs at the time of third party notice or when an injunction was sought; and (3) PCPAO had no duty to provide the records in the format requested, accurately calculated copy costs, and appropriately applied rules about intake and output of PRA requests? (Appellant's Assignment of Errors 1.a-g, i (1-21, 24-43), j (1-16), k (1-3); 5.g, i (1-4)).

III. ASSIGNMENTS OF ERROR ON CROSS APPEAL

1. The trial court erred in ruling RCW 4.24.550, the Community Protection Act, is an "other statute which exempts or prohibits" the "blanket" disclosure of sex offender registration records, SSOSA, and SSODA reports by a county sheriff in response to a request for records made under the Public Records Act.

2. The trial court erred in ruling that RCW 4.24.550 provides the "exclusive mechanism" for public disclosure of sex offender registration records and is an "other statute" pursuant to RCW 42.56.070 for purposes of the PRA.

3. The trial court erred in ruling that RCW 4.24.550(3)(a) imposes a three part "particularized relationship" test that a public record requester

must satisfy as a prerequisite to production of documents pertaining to registered sex offenders possessed by a county sheriff.

4. The trial court erred in ruling that Ms. Zink's record requests "do not fall within any of the permitted disclosures of sex offender information because she does not satisfy RCW 4.24.550(3) [.]"

5. The trial court erred in ruling that Pierce County was prohibited from producing registration records of adult sex offenders to Ms. Zink.

6. The trial court erred in issuing a permanent injunction that prohibits the disclosure of non-exempt public records.

7. The trial court erred in ruling that special sex offender sentencing alternative (SSOSA) evaluation reports and special sex offender disposition alternative (SSODA) evaluation reports judicially considered for sentencing purposes and later possessed by the Pierce County Sheriff for purposes of offender risk classification, registration, and community notification, are "exempt from disclosure" under the Health Care Information Act, Chapter 70.02 RCW in response to a Public Records Act request.

8. The trial court erred in ruling that SSOSA and SSODA evaluations are "health care records" that are confidential and exempt under the Health Care Information Act, RCW 70.02 et. seq.

9. The trial court erred when it ruled that RCW 70.02 provides "the exclusive mechanism" for public disclosure of SSOSA and SSODA evaluations "without patient consent."

10. The trial court erred in ruling that RCW 42.56.230(7) creates an exemption requiring the Pierce County Sheriff to redact personal identifying information contained in sex offender registration records, to include: social security numbers, driver's license numbers, address information, street address, email address, dates of birth, phone numbers, vehicle registration numbers or title numbers, patient identification numbers, court case numbers, employer names and addresses, "and any personal characteristics, including photographic images."

11. The trial court erred in enjoining Pierce County from the production of SSOSA evaluations absent redaction of any and all information that could reasonably expected to identify the offender, including but not limited to the offender's name, the names of family members, driver's license numbers, address information, email address, dates of birth, phone numbers, court case numbers, employer names and addresses, and any personal characteristics, including photographic images.

IV. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR ON CROSS-APPEAL

1. Did the trial court err in ruling that the Community Protection Notification Act, RCW 4.24.550, operates as an "other statute" under the PRA that exempts production of sex offender registration records held by the Pierce County Sheriff when the State Supreme Court subsequently issued a contrary decision in *Doe ex. rel. Roe v. Washington. State Patrol*?

2. Did the trial court err in ruling RCW 42.56.230(7) exempts production of personal identifying information found in sex offender registration records held by the Pierce County Sheriff when the plain terms of that statute and its legislative history demonstrate that the exemption acts only to exempt records submitted to DOL in an application for a license/identicard for the purpose of establishing the applicant's identity, age or residency?

3. Did the trial court err in ruling that SSOSA and SSODA evaluation sentencing records used by a court, and subsequently possessed by the Pierce County Sheriff's Department (PCSD) for offender registration and risk classification, qualify as the "confidential" "health care records" of a "patient" requiring PCSD to comply with the Health Care information Act HCIA), RCW 70.02, and obtain an offender's consent prior to disclosing those sentencing records in response to a PRA request?

4. Did the trial court err in ruling the Pierce County Sheriff's Department (PCSD) must comply with the disclosure requirements of the

HCIA, RCW 70.02, when the HCIA restricts only record disclosures made by a "health care provider" or "health care facility" and the trial court made no finding that PCSD is either a health care provider or health care facility under the HCIA?

5. Does *Doe ex rel. Roe v. Washington State Patrol*, control this court's determination of whether RCW 4.24.550 is an "other statute" exemption under the PRA and is Zink entitled to costs and fees where she is not the prevailing party? (Appellant's Assignment of Error 1.h, k (4))

V. STATEMENT OF THE CASE

A. PCSD REQUEST AND PRODUCTION

1. The Request

On October 6, 2014, Donna Zink made a Public Records Act (PRA) request directed to the Pierce County Sheriff's Department (PCSD) for all Special Sex Offender Sentencing Alternative ("SSOSA") and Special Sex Offender Disposition ("SSODA") evaluations, Victim Impact Statements for sex offenders, Registration Forms of all sex offenders registered in Pierce County, and a list and/or data base of all sex offenders registered in Pierce County. CP 2341. The request covered records for all Level I, II, and III registered sex offenders both juvenile and adult. CP 2300. PCSD determined that approximately 2,700 offenders were registered in Pierce County and that about 250,000 responsive records

were at issue. CP 2341.

On October 13, 2014, PCSD sent a "five day" letter to Zink in response to her record request of October 6, 2014. CP 2341.

2. Third Party Notice

PCSD provided third party notice to offenders registered in the county based on its understanding that Zink had made similar requests in other jurisdictions where offenders had obtained Superior Court orders granting injunctive relief prohibiting release of registration records. CP 2341. PCSD's third party notices advised each registered offender that records would be released unless the offender obtained a court order prohibiting release in whole or in part. CP 2302.

At the time that PCSD provided third party notice to the subject offenders it had not yet completed or finalized its production of responsive records to Zink. CP 2342. Zink was at all times aware of the exemptions claimed by Pierce County, to include the trial court's temporary restraining orders prohibiting disclosure of the records pending a final hearing on the injunctive actions filed by the plaintiffs to these proceedings. CP 2342. Zink's knowledge of the claimed exemptions was based upon her appearance before the trial court in all matters consolidated under Pierce County Superior Court Case No. 14-2-142931-1 where she had notice and the ability to challenge all exemptions claimed by the parties and the ruled

upon by court. CP 2342.

3. Production

On November 24, 2014, PCSD sent a first installment of records to Zink which included the Offender Watch databases for all Level II and III offenders as well as noncompliant Level I offenders whose last names began with the letters "A" or "B." CP 2344. Redactions made to the records were identified in a letter sent to Zink. CP 2344.

On November 25, 2014, as part of a follow up email Zink sent a second new request to PCSD seeking "Judgment and Sentences" of all registered sex offenders. CP 2341. In that same email Zink also requested a list of all third parties notified of her record request. CP 2341.

PCSD produced and sent additional installments of records to Zink as follows: (1) on 12/23/14 paper judgment and sentence records for Level II and III offenders whose last names began with "A" through "D"; (2) on 2/17/15 registration file records for all noncompliant Level I offenders whose last names began with "A" through "D"; on 4/14/15 registration file records for all noncompliant Level I offenders whose last names began with "E" through "G" and "H; through "J"; on 6/8/15 registration file records for all noncompliant Level I offenders whose last names began with "K" through "M"; on 7/7/15 records for noncompliant Level I offenders whose last names began with "N" through "Z"; on 7/24/15

Judgment and Sentence and Victim Impact Statement records pertaining to offenders whose last names began with "Y" or "Z." CP 2344.

B. PCPAO Request

1. The Request

Zink's original request to PCPAO was received on November 21, 2014. CP 2347. In this request she sought "any and all judgment and sentence documents held anywhere in Pierce County relating to individuals convicted of sex offenses." Zink stated that she wanted responsive records emailed or faxed to her. CP 2347.

Zink's request did not comply with the rules for PRA requests to Pierce County: (1) it was not directed to the public records officer, (2) it was not sent via US postal service, and (3) it did not contain her return address. CP 2204. In spite of these deficiencies, PCPAO made efforts to fulfill the request, but at the outset attempted to develop that the request would have to be handed via US mail. CP 2347. However, because the requestor, Zink, never provided her mailing address, the correspondence was inadvertently sent to the wrong address. CP 2204. It became clear that Zink was receiving these mail correspondences, as her communications indicate that she received the PCPAO letters and challenged the format and delivery of her documents. CP 2205, 2213-14.

PCPAO explained in the five day letter that the office does not waive any copy, media or mailing costs associated with records production and that payment must be made before the records would be copied for Zink. CP 2347. The process was estimated to take four weeks to complete. *Id.* There was no third party notice letter issued. *Id.*

2. Follow Up

On December, 4, 2014, PCPAO sought clarification from Zink as to whether her request was for records of only sex offenses or for records of all offenses listed in statutes that she had attached to her initial request. The letter also outlined that Zink should respond by return mail, or otherwise contact the office within 30 days or the request would be closed. CP 2348.

As of January 9, 2015, there was still no response from Zink so PCPAO sent another letter seeking clarification from her regarding the scope of her request and stating that the office would be interpreting her request as a "copy of all judgment and sentence documents and all plea agreement documents held anywhere in Pierce County that related to individuals convicted of any sex offenses and/or sexually motivated offenses in the ten years preceding the request." Information regarding the first installment of records was estimated to be sent within two weeks. CP 2348.

3. Calculation of Copying Costs

Also in the January 9, 2015, letter, PCPAO gave a basic explanation of the charges the office would asses for viewing or copying the records. It was explained that to view the records, there would be no charge. The cost of receiving copies of the records would be $.015 per page, plus postage, pursuant to RCW 42.56.120. An hourly labor rate would be used to assess charges for electronically scanning copies. CP 2348.

4. Production

On January 23, 2015, PCPAO provided notice by mail to Zink that the first installment of 1,398 pages of non-exempt records were available for her to view for free or to receive copies of for a charge. The charges to be assessed for copying and mailing the records would be $225.70. CP 2348-49. Pursuant to PCC 2.04 and the Pierce County Prosecuting Attorney's Office Statement of Factors and Manner, the charges to be assessed for scanning the records to a CD and mailing the CD to Zink would be $84.20; the charges for faxing the records would be $80.48. CP 2349. The office noted that the first installment of copies would not be sent to Zink until the office received payment for that installment and that the request would be closed if the office did not hear from Zink within 30 days. CP 2349.

On January 26, 2015, the office received two fax communications from Zink. In these faxes, Zink asked if all of the responsive records were in paper format, and she stated that she wanted electronic copies to be sent to her via email or placed in the cloud. She also wanted an itemized cost analysis for the proposed charges. Zink clarified her records request was not limited to a specific time range. CP 2349.

On January 28, 2015, Ms. Glass replied to Zink by mail and informed her that the change in the search period of her request expanded the number of responsive records and the time to produce such records. Ms. Glass again outlined the calculation of costs to produce the records in various formats, including paper copies, CD or fax, and provided a copy of the 2015 Pierce County Prosecuting Attorney's Office Statement of Factors and Manner and a copy of RCW 42.56.120, regarding charges for copying records. CP 2349.

On January 31, 2015, Zink communicated with PCPAO office by fax, and indicated that she felt that the Statement of Factors and Manner was inadequate for determining costs. Zink said that this fax was her last, and that she would consider the office's decision as a denial of access to the records. She noted that she would not communicate further with the office in any form other than e-mail or fax. CP 2349.

On February 4, 2015, Ms. Glass responded to Zink by mail and confirmed that the 1,398 pages of non-exempt, responsive records were still available for viewing at no charge, or for copying at the charges set out in previous correspondence. CP 2350. In addition, it was explained that the records would be available until February 23, 2015, and at that time, if Zink had not made payment for, or viewed, the records, PCPAO would consider her request abandoned since the records were made available on January 23, 2015. CP 2350.

On February 23, 2015, because Zink had not paid for or viewed the installment of records made available to her on January 23, 2015, PCPAO office closed Zink's request as abandoned. CP 2350.

C. PROCEDURE

1. John Doe L. – O. v. Pierce County v. Donna Zink, (Doe I), No. 14-2-14293-1

On November 13, 2014, Plaintiffs "JOHN DOE L, ; JOHN DOE M; JOHN DOE N; AND JOHN DOE O" filed a class action complaint seeking declaratory and injunctive relief on behalf of all individuals named in the requested records who were classified as risk Level 1 sex offenders and who were in compliance with their registration requirements. CP 236-255.

On November 21, 2014, Pierce County Superior Court Judge Nevin issued a temporary restraining order enjoining Pierce County from releasing any of the records requested by Zink "pertaining to compliant Level I sex offenders" with the exception of Victim Impact Statements until such time that the court could rule on a preliminary injunction. CP 908. In response to Zinks' second record request seeking PCSD's third party notice records, the court specifically prohibited Pierce County from disclosing "any records or information to Zink" that pertained to "Any and all notifications the county has sent, or will send, to sex offenders[.]" CP 907-908.

On December 30, 2014, in cause number 14-2-14293-1, Judge Nevin issued a preliminary injunction order directing Pierce County to "not disclose or disseminate any records or information pertaining to compliant level 1 sex offenders to any member of the general public or pursuant to the request by Donna Zink or any comparable Public Records Act Request until further order." CP 973. The court indicated that its order "does not apply to Victim Impact Statements and Judgment and Sentences. CP 973.

2. John Doe D. v. Pierce County and Donna Zink, (Doe II), 14-2-15100-0

On December 23, 2014, Plaintiff "JOHN DOE D" filed separate a class action complaint for declaratory and injunctive relief on behalf of all individuals classified as risk Level II or risk Level III sex offenders who submitted sex offender registration forms or underwent psychosexual mental health evaluations in the possession of Pierce County on or after the date of Zink's public record request. CP 2800-2812.

On January 20, 2015, Judge Costello granted a preliminary injunction enjoining Pierce County from disclosing or disseminating any Level II or Level III sex offender records to any member of the general public, including Donna Zink, until further order of the court. CP 2908-2911. Judge Costello rejected plaintiffs' argument concerning confidentiality of SSOSA evaluation reports and specifically ruled that the County was "not enjoined from releasing any psychosexual records for any level 2 or 3 offender convicted as an adult." CP 2908-2911.

3. John Doe G. v. Pierce County and Donna Zink, (Doe III), 15-2-06442-3

An action was filed on behalf of John Doe G – a level 3 sex offender. 3/2/15, Complaint, No. 15-2-06442-3. CP 3101-3124.

On March 13, 2015, Pierce County Superior Court Judge Serko entered a preliminary injunction pertaining to Zink's October 3, 2014, PRA request enjoining Pierce County from disclosing as follows:

> Pierce County Sheriff's Department shall not disclose or disseminate any of the requested records or information of the Plaintiff to the Requestor, Donna Zink, or to any other member of the general public, until further order of the Court. Pierce County is not enjoined from releasing any documents that are already a matter of public record contained either in the Plaintiff's criminal court file at the Pierce County Clerk's Office, or on the registered sex offender website maintained by the Pierce County Sheriff's Department . . .

3/13/15, Order Granting Plaintiff's Motion for Preliminary Injunction. CP 3205-3211.

4. Pierce County v. Donna Zink, 15-2-05605-6

On January 29, 2015, Pierce County filed a Petition for Declaratory and Injunctive Relief pursuant to RCW 42.46.540, seeking an injunction preventing the disclosure of any juvenile records which fell under Zink's request, regardless of the sex offender level, unless those records were redacted. CP 3090-3094.

Zink filed an "Answer to Petition for Declaratory and Injunctive Relief and Cross Claim for Violations of the Washington Public Records Act on March 23, 2015." CP 1074-1089. Included in her cross claims were claims against Pierce County Prosecuting Attorney's Office (PCPAO) and Pierce County Sheriff's Department (PCSD). CP 1074-1089 Against PCPAO she alleged that:

> (1) Only offered to provide records for inspection/copying or on CD/DVD and not electronically via email or cloud. (Counterclaim 3.2(C)). CP 1077.

(2) Charged excessive fees/costs. (Counterclaim 3.5(E)). CP 1079-1080.

(3) 3rd party notification improperly given. (Counterclaim 3.5(E)). CP 1079-1080.

(4) Failed to identify an exemption. (Counterclaim 3.5(D)). CP 1079.

(5) Conviction records must be disclosed, RCW 10.97.050(1) (Counterclaim 3.11 (A)-(D)). CP 1083.

(6) Wrongful withholding of any and all records or information pertaining to level II and III sex offenders. (Counterclaim 3.9A). CP 1082.

CP 1074-1089.

As to PCSD, she claimed:

(1) No exemption or explanation of exemption. (Counterclaim 3.5 (C)(D)). CP 1079

(2) 3rd party notification improperly given (Counterclaim 3.5(E)). CP 1079-1080.

(3) No identified exemption (Counterclaim 3.5(C)(D)). CP 1079.

(4) Conviction records must be disclosed, RCW 10.97.050(1), (Counterclaim 3.11 A-D) citing art 1, sec. 10. CP 1083.

(5) Wrongful withholding of any and all records or information pertaining to level II and III sex offenders (Counterclaim 3.9A). CP 1082.

CP 1074-1089

On April 17, 2015, the trial court entered a preliminary injunction ordering:

> The Defendant shall not disclose or disseminate any juvenile records or information pertaining to juveniles unless the records are otherwise located in an open court file or unless the Defendants, based on their review of the records, believe they can redact the material as contemplated in *Resident Action Council v. Seattle Hous. Auth.,* 177 Wn.3d 417 (2014).

(CP 1153-1159) (4/17/15, Order Granting Petitioner's Motion for Preliminary Injunction, No. 14-2-14293-1, *emphasis added.*)

5. Consolidation

On February 27, 2015, Judge Nevin entered separate orders consolidating case number. 15-2-05605-6 and 14-2-15100-0 under the case of *John Doe L et al. v. Pierce County*, cause number 14-2-142931-1. CP 1033.

On March 27, 2015, Judge Sorensen entered an order consolidating 15-2-06442-3, *John Doe G. v. Pierce County*, under the case of John Doe L et al. v. Pierce County, cause number 14-2-142931-1. CP 1093

On June 25, 2015, Plaintiff-Intervenor "JOHN DOE C," who was identified only as a Level 1 sex offender, filed a motion to intervene in the consolidated action. CP 1171-1173. On June 26, 2015, Judge Sorensen granted the motion to intervene. CP 1192-1193.

6. Final Hearing on Permanent Injunction & Summary Judgment

On September 25, 2015, the consolidated matter came before the Honorable Phil Sorenson on several motions: (1) Pierce County's Motion

for Summary Judgment on Zink's Counterclaims, (2) Pierce County's Motion for Final Injunctive Relief, (3) *John Doe* motions for Summary Judgment and Permanent Injunctions. RP 1-2 (9/25/15). Zink did not appear for argument. *Id.* RP 4.

a. Summary Judgment on Counterclaims

The court granted Pierce County's Motion for Summary Judgment against Zink's Counterclaims, denied Zink's Cross Motion for Summary Judgment, and findings of fact and conclusions of law were entered on October 9, 2015. CP 2340-2354. The court also determined that "stand alone claims for improper exemption logs do not provide for daily penalties under the PRA 42.56." CP 2352. The court further held that each party is to bear its own costs and fees, with the exception of the "costs incurred to obtain a proper redaction log for the PCSD April 14, 2015, production, which was remedied on August 12, 2015."[1] CP 2354.

Included in the findings, was a finding that Zink narrowed her PRA request to PCSD by her filings with the court. CP 2352, COL 6. The trial court found that Zink had narrowed her request and made factual findings regarding what was left at issue for production:

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[1] The court also held that "to the extent this order makes a finding that redaction logs were not timely produced, the only payment due is the cost associated to bring the claim to recover a proper exemption log as Ms. Zink is pro se. Upon filing of a detailed affidavit outlining Ms. Zink's costs, the court will review a motion for costs." CP 2352. No such motion was ever made. Nor does Ms. Zink attempt to argue this on appeal.

> Ms. Zink has narrowed and clarified her PCSD record request in pleading she submitted to this court. Based on her clarification in briefing filed, the PRA request which forms the basis of Ms. Zink's counterclaims is limited to: Judgment and Sentences, Victim Impact Statements, Registrations Forms, and SSOSA's and SSODAs, and Third Party Notification Lists. It no longer includes a request for the database, or other information contained in the registration files (electronically or hard paper).

CP 2346, FOF IV.6. This finding is supported by the record. *See* CP 2069 (Response to Pierce County Motion for Permanent Injunction p. 7, Ms. Zink clarifies that she is only asked for records found in the "official court file," to include any sentencing, judgment, plea agreements[2] (SSODA) and victim impact statements.")

b. Permanent Injunction on Juvenile Records

The court granted Pierce County's request for a permanent injunction prohibiting the release of the juvenile records to Zink. CP 2335-2338. The court held that RCW 13.50.050 was an "other statute" exemption prohibiting release of the juvenile records and that without issuance of an injunction there was a substantial likelihood that the juveniles would suffer irreparable harm. (CP 2337-2338). However, the court did permit release of the records subject to redaction of any identifiers. (CP 2338).

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[2] Zink uses the term "plea agreements" throughout her briefing as a record she requested. However, no "plea documents" were requested, only SSOSA's and SSODA's. CP 2341 (FOF I.1.2); CP 2347 (FOF VI.1); CP 1603-4, 1697.

c. Granting of John Does Permanent Injunction

The court granted summary judgment and declaratory judgment providing a permanent injunction to the John Does. CP 2299-2312; 2313-2322; 2550-2564. The court ruled that RCW 4.24.550 is an "other statute" pursuant to RCW 42.56.070 which exempts or prohibits disclosure of sex offender registration records. CP 2316. The court ruled that RCW 4.24.550(3)(a) constituted a multi-part test that prohibited "blanket" disclosure of sex offender information held by the Pierce County Sheriff and that Ms. Zink failed to satisfy that test. CP 2317. The court ruled that RCW 42.56.230(7) exempts disclosure of personal identifying information contained in sex offender registration forms held by the Pierce County Sheriff, to include social security numbers, driver's license numbers, address information such as street or email addresses, dates of birth, phone numbers, vehicle registration or vehicle title numbers, patient identification numbers, court case numbers, employer names and addresses, and any personal characteristics including photographic images. CP 2557. The court ruled RCW 70.02 is an "other statute" pursuant to RCW 42.56.070 that governs access to health care information, and that SSOSA and SSODA evaluations are confidential health care information. CP 2318-2319; 2559. The court ruled that none of the permitted disclosure for medical records in RCW 70.02 allow for "blanket disclosure" of

SSOSA and SSODA evaluations to Ms. Zink by the Pierce County Sheriff. CP 2319. The court ruled that disclosure of SSODA evaluation is governed by RCW 13.50.050, that those records are not part of the official court file and therefore confidential, and can be disclosed only if any and all information that could reasonably be expected to identify the offender is redacted. CP 2561. The court ordered that Pierce County shall not produce sex offender registration records, including any un-redacted SSOSA or SSODA evaluations of level I compliant sex offenders or level II or III sex offenders. CP 2320-2321; 2562-2563. The court ordered that Pierce County could produce "juvenile offender documents that are not part of the official court file, SSOSA or SSODA evaluations" only if all information that could reasonably be expected to identify the offender was redacted by the county as previously indicated in its ruling regarding the application of RCW 42.56.230(7). CP 2321; 2562.

VI. LAW AND ARGUMENT

GENERAL PRA LAW

Under the PRA the "public can demand any public record from any public agency at any time for any reason, unless the *nature of the material* is such that it is protected." *See Soter v. Cowles Publ'g Co.*, 131 Wn.App. 882, 900 (2006)(emphasis in original).

The PRA requires state and local agencies to produce all public records upon request unless the records fall within specific exemptions in the PRA or "other statute which exempts or prohibits disclosure of specific information or records." RCW 42.56.070(1); *Gendler v. Batiste*, 174 Wn.2d 244, 251, 274 P.3d 346 (2012). Exemptions under the PRA are narrowly construed to promote the strong public policy favoring disclosure. RCW 42.56.030; *Franklin County Sheriff's Office v. Parmelee*, 175 Wn.2d 476, 479, 285 P.3d 67 (2012), *cert. denied*, —— U.S. ——, 133 S.Ct. 2037, 185 L.Ed.2d 899 (2013).

Summary judgment is appropriate in PRA litigation. *See Spokane Research & Def. Fund v. Spokane*, 155 Wn.2d 89, 106 (2005)(summary judgment "an appropriate procedure in PDA cases"); *BIAW v. McCarthy*, 152 Wn.App. 720, 736 (2009)(same); *See Also City of Lakewood v. Koenig*, 128 Wn.2d 87, 343 P.3d 335 (2014) (affirming summary judgment of PRA claim seeking police re-ports and other records gathered by PCPAO as part of its "determination not to press charges" against a police officer); *Sperr v. City of Spokane*, 123 Wn.App. 132, 136 (2004) (PDA claim dismissed on summary judgment).

An appellate court reviews actions under the PRA and the injunction statute de novo. *Doe ex rel. Roe v. Washington State Patrol*, 185 Wash. 2d 363, 370–71, 374 P.3d 63, 66 (2016), (*citing* RCW

42.56.550(3); *Spokane Police Guild*, 112 Wn.2d at 35, 769 P.2d 283). "Where the record consists only of affidavits, memoranda of law, other documentary evidence, and where the trial court has not seen or heard testimony requiring it to assess the witnesses' credibility or competency, we ... stand in the same position as the trial court." *Dragonslayer, Inc. v. Wash. State Gambling Comm'n*, 139 Wash.App. 433, 441–42, 161 P.3d 428 (2007) (*citing Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wash.2d 243, 252–53, 884 P.2d 592 (1994) (PAWS II) (plurality opinion)).

A. The trial court properly granted the injunction prohibiting carte blanche release of juvenile records where such records are confidential under RCW 13.50.050(3).

Under RCW 42.56.540, a court may enjoin production of requested records upon motion and affidavit by an agency if it makes a finding that a "specific exemption applies and examination would clearly not be in the public interest and would substantially and irreparably damage any person, or would substantially and irreparably damage vital governmental functions." *Soter v. Cowles Pub. Co.*, 162 Wn. 2d 716, 757, 174 P.3d 60, 82 (2007). Therefore, "[t]he court must find that a specific exemption applies and that disclosure would not be in the public interest and would substantially and irreparably damage a person." *Yakima County v. Yakima Herald–Republic*, 170 Wn.2d 775, 808, 246 P.3d 768 (2011) (*citing Soter*

v. Cowles Publ'g Co., 162 Wn.2d 716, 757, 174 P.3d 60 (2007)). The party seeking to prevent production has the burden to prove that the requested documents fall within the scope of an exemption. *Dragonslayer, Inc. v. Wn. State Gambling Comm'n*, 139 Wn.App. at 441.

Here, the trial court properly entered a permanent injunction enjoining Pierce County from releasing juvenile records maintained by the Pierce County Sheriff's Department sex offender registration unit where RCW 13.50.050(3) precludes release of juvenile records and where absent such an injunction juvenile offenders may suffer irreparable damage or harm.

As the trial court properly found, PCSD, as a local law enforcement agency, will come into possession of SSODAs and other juvenile records.[3] CP 2336-7 (FOF 1 and 5). RCW 4.24.550(6) requires juvenile courts to "provide local law enforcement officials with all relevant information on offenders," which includes SSODA evaluations, so that local officials can make an accurate risk assessment. *State v. Sanchez*, 177 Wn. 2d 835, 847-48, 306 P.3d 935, 941 (2013).[4]

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[3] Juveniles facing a first-time conviction for certain sex offenses in Washington may seek a element alternative to traditional sentencing called a special sex offender disposition alternative (SSODA). *See RCW 13.40.162*. If a juvenile is SSODA eligible, the court may order an evaluation to determine the offender's amenability to treatment. *Id*

[4] The court in *Sanchez*, declined to address whether release of SSODA evaluations to local law enforcement agencies would render them producible in a public records act request. *State v. Sanchez*, 177 Wn. 2d 835, 849, 306 P.3d 935, 941 (2013) ("There is no

RCW 13.50 outlines the "Keeping and Release of Records by Juvenile Justice or Care Agencies." PCSD is a "juvenile justice or care agency." *See* RCW 13.50.010 (which defines "juvenile justice or care agency" as "any of the following: Police, diversion units, court, prosecuting attorney, defense attorney, detention center . . . ."). RCW 13.50 is an "other statute" that exempts or prohibits disclosure of particular documents under the PRA and "because the PRA and chapter 13.50 RCW do not conflict, chapter 13.50 RCW supplements the PRA and provides the ***exclusive process for obtaining juvenile justice and care agency records***." *Deer v. Dep't of Soc. & Health Servs.*, 122 Wn.App. 84, 92-93, 93 P.3d 195 (2004).

RCW 13.50.050(3) provides:

> All records other than the official juvenile court file **are confidential** and may be released only as provided in this chapter, RCW 13.40.215 and RCW 4.24.550.

RCW 13.50.050(d) (*emphasis added).*

As the trial court properly concluded, any records retained of a juvenile offender, including SSODA petitions, may not be released and are confidential. CP 2335-2338. This finding is supported by the record below. *See* CP 1607 (outlining that many records received by PCSD as a

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need for us to consider the merits of a purely hypothetical request for Sanchez's SSODA evaluation. Accordingly we decline to reach the PRA issue at this time).

juvenile justice agency are not otherwise found in court records). The trial court's ruling is consistent with the ruling announced in *State v. A.G.S.*, 182 Wn.2d 273, 340 P.3d 830 (2014), where the Washington Supreme Court analyzed juvenile SSODA records and held that because SSODA records are not part of the juvenile court file, a court may not release the records without violating the confidentiality provision under RCW 13.50.010(1)(b).

Therefore, as a juvenile justice agency, PCSD is not authorized to release any juvenile records. Zink summarily argues that "[a]ll juvenile records requested by Zink are found in the "juvenile court file" as required by RCW 9.94A.480 and must be open to public inspection." (Opening Brief of Appellant Zink at 95). Zink's argument grossly mischaracterizes the records at issue and ignores the language of the injunction entered below. CP 2336-37, CP 1607. Pierce County never argued that any publically filed documents were subject to exemption. *Id.* Instead, the injunction was sought on behalf of all juvenile records which were <u>not</u> part of the court record.[5] *See* CP 1577-1584 (Motion for Permanent Injunction).

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[5] SSODAs are not part of court records. *See A.G.S.*, 182 Wn.2d at 834. Also, RCW 13.50.050(3)'s plain language states that only those records that are part of the "<u>official juvenile court file</u>" are confidential. PCSD does not control or maintain the court file. Zink has every right to request any documents she is seeking which she believes are part of the official juvenile court file from the Clerk's office.

The public records act contemplates issuance of an injunction "upon motion and affidavit by an agency or its representative" and where the court finds that examination of the record "would clearly not be in the public interest and would substantially and irreparably damage any person." RCW 42.56.650. The legislature has already carved out that juvenile records are not in the public interest by enacting RCW 13.50.050(3). (CP 2337, FOF 6). Release of such records could irreparably harm a juvenile's reputation and privacy. *Id.* These findings were supported by the record. (CP 1607).

Further, Pierce County sought, and the trial court entered, a narrow injunction consistent with the *Resident Action Council v. Seattle Hous. Auth,*'s[6] requiring redaction when feasible, rather than entirely withholding.[7] *See* CP 2338. The final order also gave explicit guidelines

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[6] *Resident Action Council v. Seattle Hous. Auth,*:

> [I]f the exemption is categorical, or if the exemption is conditional and the condition is satisfied, then the agency must consider whether the exemption applies to entire records or only to certain information contained therein. If the exemption applies only to certain information, then the agency must consider whether the exempted information can be redacted from the records such that no exemption applies (and some modicum of information remains). **If the exemption applies to entire records, then those records are exempted and need not be disclosed, unless redaction can transform the record into one that is not exempted (and some modicum of information remains).** If effective redaction is possible, records must be so redacted and disclosed. Otherwise, disclosure is not required under the PRA.
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> *Resident Action Council v. Seattle Hous. Auth.,* 177 Wn. 2d 417, 437, 327 P.3d 600, 607-08 (2013), *as amended on denial of reh'g* (2014), *emphasis added.*

[7] There is a strong argument to be made that under the broad protection afforded under RCW 13.50.050(3), absolute withholding is appropriate of all juvenile records.

for the type of personal identifiers subject to redaction. *See* CP 2338.[8]

B. The trial court properly granted summary judgment against Zink's counterclaims where (1) PCSD properly gave third party notice; (2) the production was not final; and (3) alternatively, where there was no merit to the PRA claims.

The trial court properly granted summary judgment against Zink's counterclaims under the PRA, finding that (A) third party notification was properly given and that there was no delay of production; (B) that a PRA action was premature where production was not final; and (C) there was no merit to the claims regarding intake/method of production or calculation of costs to produce records. Also, Zink has failed to preserve either below, or on appeal, several of the issues brought before this court.

1. Third Party Notification was properly given.

The PRA permits notification to third parties to give them an opportunity to protect information subject to potential release under the PRA. *See* RCW 42.56.540 ("An agency has the option of notifying persons named in the record or to whom a record specifically pertains, that release of a record has been requested.")

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[8] This limitation was based on RCW 13.50.050(5), which provides that:
> except as provided in "RCW 4.24.550, information not in an official juvenile court file concerning a juvenile or juvenile's family may be released to the public only when that information *could not reasonably be expected to identify[8] the juvenile or juvenile's family*." (*emph. Added*).

Pierce County Code (PCC) 2.04.040 outlines the process for notification to third parties:

> (D) **Protecting rights of others.** In the event that the requested records contain information that may affect rights of others and may be exempt from disclosure, the public records manager may, prior to providing the records, give notice to such others whose rights may be affected by the disclosure. Such notice should be given so as to make it possible for those other persons to contact the requestor and ask him or her to revise the request, or, if necessary, seek an order from a court to prevent or limit the disclosure. The notice to the affected persons will include a copy of the request.

Emph. added; Attached Appendix pages 13-23.

This language is identical to that contained in the WAC model rules. *See* WAC 284-03-025. *See Also* WAC 44-14-04003[9] (as part of the

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[9] (11) Notice to affected third parties. Sometimes an agency decides it must release all or a part of a public record affecting a third party. The third party can file an action to obtain an injunction to prevent an agency from disclosing it, but the third party must prove the record or portion of it is exempt from disclosure. RCW 42.17.330/RCW 42.56.540. Before sending a notice, an agency should have a reasonable belief that the record is arguably exempt. Notices to affected third parties when the records could not reasonably be considered exempt might have the effect of unreasonably delaying the requestor's access to a disclosable record.

The act provides that before releasing a record an agency may, at its 'option,' provide notice to a person named in a public record or to whom the record specifically pertains (unless notice is required by law). RCW 42.17.330/42.56.540. This would include all of those whose identity could reasonably be ascertained in the record and who might have a reason to seek to prevent the release of the record. An agency has wide discretion to decide whom to notify or not notify. First, an agency has the 'option' to notify or not (unless notice is required by law). RCW 42.17.330/RCW 42.56.540. Second, if it acted in good faith, an agency cannot be held liable for its failure to notify enough people under the act. RCW 42.17.258/RCW 42.56.060. However, if an agency had a contractual obligation to provide notice of a request but failed to do so, the agency might lose the immunity provided by RCW 42.17.258/42.56.060 because breaching the agreement probably is not a 'good faith' attempt to comply with the act.

model rules, outlines the responsibilities of agencies in processing requests and provides for third party notification); *See Also Mechling v. City of Monroe*, 152 Wn.App. 830,849, 222 P.3d 808 (2009)(Model Rules are not binding on agencies and only offer guidance).

The trial court properly concluded that third party notice was appropriately given and there were sufficient facts below to support the findings. (CP 2341-2342, FOF II 1-4; CP 2352, COL 2). Because both the PCC and the WAC provide for third party notice where there may be an exemption and require in the notice a copy of the request, there was no violation of the act or Zink's rights as alleged. As the court found, the county had a reasonable belief that an exemption may apply. (CP 2341, FOF II.1); CP 1607-1608 (outlining PCSD's understanding that Superior Courts were granting injunctions prohibiting release of documents pertaining to a similar request). The trial court also properly found that

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The practice of many agencies is to give ten days' notice. Many agencies expressly indicate the deadline date to avoid any confusion. More notice might be appropriate in some cases, such as when numerous notices are required, but every additional day of notice is another day the potentially disclosable record is being withheld. When it provides a notice, the agency should include the notice period in the 'reasonable estimate' it provides to a requestor.

The notice informs the third party that release will occur on the stated date unless he or she obtains an order from a court enjoining release. The requestor has an interest in any legal action to prevent the disclosure of the records he or she requested. Therefore, the agency's notice should inform the third party that he or she should name the requestor as a party to any action to enjoin disclosure. If an injunctive action is filed, the third party or agency should name the requestor as a party or, at a minimum, must inform the requestor of the action to allow the requestor to intervene.

third party notice was done in good faith, according to the PCC, and was done without any intent to delay, harass, or obstruct production of records. CP 2342, FOF II.2. This finding was supported in the record below. CP 1607-1608. The trial court also correctly found that inclusion of Zink's public records request as an attachment to its third party letter was consistent with the requirements of the code and was reasonable to allow. CP 2342 FOF II.3; CP 1607-1608.

Failure to provide a copy of the request and contact information for Zink would render the notification useless because the third party would have no way to seek an injunction against the requestor. Moreover, by making a public records request, ironically Zink's request becomes a public record. Finally, the trial court properly concluded that at the time of the issuance of a third party notification letter, it was not necessary or legally required that PCSD provide an exemption log to Zink claiming the potential exemption that may be at issue with third parties. *See Argument infra*, §VI.B.2 (*citing* RCW 42.56.210(3)). This is true where production was not final and Zink was aware of the claimed exemption as evidenced by her appearance in all consolidated matter under 14-2-14293-1. CP 2342, FOF II.4.

The trial court properly concluded that third party notice was legally appropriate in this case and that the notice was not done with intent

to delay production, but rather to have third parties step forward to seek protection of information as contemplated by RCW 42.56.540 and PCC 2.04.040.

2. The trial court properly ruled that production was not final and therefore many of the issues brought in the counterclaim were premature and that exemption logs are not due at the time third party notice is given or an injunction is sought.

Zink filed the lawsuit prior to finalization of her request. As such, many of her claims were not ripe for review. The trial court found that:

> [I]t was not necessary or legally required that PCSD provide an exemption log to Ms. Zink claiming the potential exemptions that may be at issue with third parties . . . because (1) PCSD's production had not yet been finalized and exemptions logs are not required until production is finalized.

CP 2342, FOF II-4. The court further found:

> At the time the counterclaim was brought, record production was still ongoing. PCSD had not made a final determination on juvenile records - as well as many other records - due to the volume of records. There is no requirement under the Public Records Act, RCW 42.56, that required Pierce County to stop in mid-response and make exemption logs for records that Pierce County had yet to review for potential exemptions or redactions, and that it may yet produce after review is complete, while a preliminary injunction is in effect and a permanent injunction motion is pending. The PRA does not require the production of exemption logs prior to review of records and the closing of an agency response. Such a requirement serves no legal or practical purpose and would needlessly take time away from production of other records not subject to the potential exemptions at issue in the injunctions.

CP 2345, FOF IV-4.

Each of these findings is supported by substantial evidence and is an accurate statement of the law.

Denial of a request to inspect or copy public records is a prerequisite for filing an action for judicial review of an agency decision under the PRA. *Hobbs v. State*, 183 Wn. App. 925, 936, 335 P.3d 1004 (2014). The PRA requires a final agency action before a suit may be brought. *See Hobbs*, 183 Wn. App. at 936.

> ... before a requestor initiates a PRA lawsuit against an agency, there must be some agency action, or inaction, indicating that the agency will not be providing responsive records.

Hobbs, 183 Wn. App. at 936. Thus, a requestor may not initiate a lawsuit before an agency has taken some form of final action. *Hobbs*, 183 Wn. App. at 937. Dismissal with prejudice is the proper remedy for bringing a premature PRA Claim. *See Hobbs*, 183 Wn. App. at 935, 946.

"When an agency responds to a request by refusing inspection of any public record in whole or in part, the response must include `a statement of the specific exemption authorizing the withholding of the record (or part) and a brief explanation of how the exemption applies to the record withheld.'" *Klinkert v. Washington State Criminal Justice Training Com'n*, 185 Wn.App. 832, 342 P.3d 1198 (2015); RCW

42.56.210(3), (*emphasis added); Progressive Animal Welfare Soc. v. Univ. of Wash.*, 125 Wn.2d 243, 271 n. 18, 884 P.2d 592 (1994). The brief explanation provision requires an agency to disclose sufficient information to allow the requestor to make a threshold determination regarding whether the exemption applies. Wash. State Bar Ass'n, Public Records Act Deskbook, supra., at § 6.7(5)(c), 6-49 *citing State v. Sanders*, 169 Wn.2d 827, 946, 240 P.3d 120 (2010). "To make this threshold determination, at minimum the requestor must know what exemption the agency is relying on, what type of record or information is being withheld, and that any conditions on the exemption have been met. While complying with these requirements is mandated by the PRA, agencies *can also use the exemption log* as an opportunity to increase public trust by educating the requestor about exemptions . . ." *Id.* (*emphasis added*).

Here, PCSD responded to Zink's request by providing unredacted and partially redacted documents. PCSD complied with its obligations under RCW 42.56.210(3) and notified Zink of the legal exemption applicable to the redacted materials. The record shows that the records at issue in this case were voluminous and that PCSD worked diligently on this request and prioritized production by gathering records most easy to

produce and rolling those into installments while noting exemptions.[10]

Zink persists to argue that continuous installment production of records does not satisfy the PRA. However, production at the time of the hearing showed that records were produced for Level I, II and III sex offenders, as well as conviction records in the form of Judgment and Sentences.[11]

Because Pierce County continued to produce records along with notification of exemptions, there was no violation of the PRA and the trial court properly dismissed all claims against Pierce County. *See* CP 2216-

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[10] CP 1608, 1609 (estimating 250,000 records); CP 1608, 1604, 1645, 1646 (12-23-14 production of judgment and sentencing paperwork for level 2 and 3 sex offenders whose names started with the letter A or B); CP 1604, 1626 - 1628 (11-24-14 partial database release); CP 1605, 1659, 1660 (2-17-15 production the entire registration file for all Noncompliant Level 1 Level A-D); CP 1605, 1662, 1663 (2-17-15 exemption log); CP 1605, 1665 – 1671 (2-19-15 email); CP 1606, 1677, 1678 (4-14-15 production of entire registration file for all Noncompliant Level 1 E-G and H-J), CP 1606, 1680 (4-20-15 a subsequent email was sent to Zink containing the production provided in the 4-14-15 email because a read receipt from Filelocker was unavailable); CP 1606, 1686 - 1688 (6-8-15 production of all Noncompliant level 1 K-M); CP 1607, 1686 - 1688 (7-7-15 production of all Noncompliant Level 1 N-Z); CP 1607, CP 1690, 1691 (7-24-15 production of Judgment and Sentences and Victim Witness Impact Statements for sex offenders starting with the last name of Y or Z).

[11] CP 1608, 1604, 1645, 1646 (12-23-14 production of judgment and sentencing paperwork for level 2 and 3 sex offenders whose names started with the letter A or B); CP 1605, 1659, 1660; CP 1604, 1626 - 1628 (11-24-14 partial database release); (2-17-15 production the entire registration file for all Noncompliant Level 1 Level A-D); CP 1605, 1665 – 1671 (2-19-15 email); CP 1606, 1677, 1678 (4-14-15 production of entire registration file for all Noncompliant Level 1 E-G and H-J); CP 1606, 1680 (4-20-15 a subsequent email was sent to Zink containing the production provided in the 4-14-15 email because a read receipt from Filelocker was unavailable); CP 1606, 1686 - 1688 (6-8-15 production of all Noncompliant Level 1 K-M); CP 1607, 1686 - 1688 (7-7-15 production of all Noncompliant Level 1 N-Z); CP 1607, CP 1690, 1691 (7-24-15 production of Judgment and Sentences and Victim Witness Impact Statements for sex offenders starting with the last name of Y or Z).

227 (declaration outlining that at the time of the hearing, PCSD production was not finalized and that there was no final determination made regarding juvenile or other records, due to the volume of records). Further, as the trial court properly found, many of Zink's claims are not ripe for review where production was not complete. *See Hobbs*, 183 Wn.App. at 946.

Nor is there any merit to Zink's contention that an exemption log was required at the time third party notice was given or at the time Pierce County sought an injunction to protect juvenile records. Exemption logs are due at the time an agency refuses inspection of any record in whole or in part (RCW 42.56.210(3)) - not at the time third party notice is given or at the time injunctive relief is sought under RCW 42.56.540. As argued *supra*, while PCSD sent third party notification and litigated its injunction, it continued with installment production and redactions and exemptions were noted. Zink is attempting to circumvent or rewrite the plain language of RCW 42.45.210(3), overlooks the validity of installment production, and as a result of this argument takes a position which would slow down the production process. The record below for PCSD production was very detailed and showed that at all times PCSD worked diligently to move this production along:

> Production as of this date is not complete. We started production with the databases referenced in paragraph 6 of this declaration. In the interest of delivering documents to Ms. Zink as quickly as possible, we turned our attention to installment production of all documents for all Noncompliant Level 1's adult offenders, as these documents were the most readily accessible and easy to produce, and began with those offenders whom we had given third party notice to. In my most recent production, we sent responsive documents of judgment and sentences and victim witness impact statement that we have in our files regarding sex offenders whose last name start with Y or Z. At the time the request came in there were roughly 2,700 persons identified as registered offenders in Pierce County.
>
> As a rough estimate, each offender file contained as few as approximately 50 pages of documents and as many as approximately 500 pages. We have hard paper copy and electronic database files for each offender. It is roughly estimated that when production is complete, roughly 250,000 records will be identified at issue in this request.

(CP 1608-1609).

> (AND)
>
> To date, production is not complete and we have not finalized production. As stated in my original declaration in ¶24 filed 8/20/15, our goal was to produce documents in the quickest fashion possible. As long as we can continue to produce documents responsive to Ms. Zink's request we will continue to do so, as has already occurred. We have not made a final determination on juvenile records - as well as many other records - due to the volume of records. To stop and make exemption logs of material we have not yet reviewed in their entirety for potential exemptions and redactions, and of records which we may or may not end up producing, depending on how the court ruled, is contrary to the requirement of the PRA and would take away valuable time from quickly producing otherwise producible records.

> Through correspondence with Ms. Zink, I was under the impression she understood the basis for the installment production and understood that we were prioritizing production. Attached as Ex. 1, are true and correct copies of correspondence via email with Ms. Zink regarding method of production. The dates on the documents accurately reflect the date and time sent/received.

CP 2216-2217. The approach Zink argues would require PCSD to stop production, scour 250,000 records which may/may not be subject to any injunctions, and create exemption logs. The approach PCSD took, which was continual production, fulfills the plain language of the PRA and its purpose.

Moreover, Zink's argument regarding failure to provide an exemption log at the time an injunction was sought is inaccurately framed and mentioned in passing without reference to any authority or citation to the record. *See* Opening Brief at page 68. Zink argues in the section of the brief titled, "Application and Statutory Sufficiency of Pierce County Code (PCC) 2.40.040," that: "[f]urther, PC took final action when they filed an action in the court to enjoin any and all requested juvenile records. No third party is involved in that action. None the less, PC did not provide an exemption log to Zink identifying all records withheld, the applicable exemption and how the exemption applies." *Id.* It is difficult to follow what Zink's legal premise is since this argument falls under the "third party" notice argument with respect to the PCC. Regardless, this

court should not consider this issue on appeal since it is inadequately briefed. *Camer v. Seattle Post-Intelligencer*, 45 Wn.App. 29, 36, 723 P.2d 1194, 1200 (1986). If this court does consider this argument on appeal, there is no support for Zink's position that an exemption log is due at the time a party seeks an injunction under RCW 42.56.540. In addition, as outlined above, production was ongoing at the time the motion for injunction was sought. There is no allegation that Pierce County froze production and waited to produce documents until a court order was entered.

The only issue below which carried any merit, was whether or not PCSD provided a proper exemption log on April 14, 2015. CP 2354.[12] With respect to this error, the court specifically held that "stand alone claims for improper exemption logs do not provide for daily penalties under the Public Records Act, 42.56." CP 2352. Zink does not provide any legal argument or citation to authority that this finding was in error. *See* Opening Brief of Appellant; RAP 10.3(a)(6).

Even if properly raised and briefed on appeal, the trial court's conclusions that daily penalties are not warranted for errors in exemption

[12] The record details that on April 14, 2015, PCSD sent responsive documents to Zink via Filelocker. (CP 1606, ¶14). Unfortunately, PCSD mistakenly believed an exemption log was attached to that production. *Id.* On August 12, 2015, PCSD remedied this error and sent the exemption log. *Id.*

logs is legally sound. Where a violation of the act pertains to exemptions only and not to a wrongful withholding or denial under the act, then the only award is costs and attorney fees. *See Sanders v. State*, 169 Wn.2d 827, 859-860240 P.3d 120 (2010)(rejecting requestor *Sanders* position that the failure to provide a brief explanation in an exemption log is a violation "deserving of a freestanding penalty under the PRA."); *See Also City of Lakewood v. Koenig*, 128 Wn.2d at 87 (holding that *Koenig* was entitled to costs and attorney fees where city failed to provide specific exemption and brief explanation). Because there was no withholding of records here, partial or in whole, the trial court properly concluded that the only remedy was costs incurred to bring the action, not daily penalties.

At the time Zink brought her counterclaims, PCSD was producing and continued to produce records to her as part of her request, irrespective of the issuance of third party notice and seeking an injunction to protect some of the potential responsive records. Accordingly, the trial court properly dismissed her PRA claims as premature.

3. Zink has failed to preserve some of the methods of production on appeal and has also failed to adequately brief many of the production issues. Even if preserved and briefed, the trial court did not err in concluding that Pierce County had no duty to provide the records in the format requested, that the copy costs were reasonable, and that mail communication was valid rather than email.

In section five of Zink's Opening Brief, she raises several issues concerning when the request came in, intake of the request, method of production, and calculation of copying costs. *See* Opening Brief of Appellant at p. 73-77. However, most of appellant's arguments in this section were either not preserved below, or are inadequately briefed.[13] Therefore, this court should not consider these arguments on appeal. Even if this court were to consider the substance of the arguments, they are without merit.

The general rule is that appellate courts will not consider issues raised for the first time on appeal." *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007) (citing RAP 2.5(a)). Under RAP 2.5(a), a claim of error may be raised for the first time on appeal in a limited number of circumstances, none of which apply here.

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[13] For example, at page 77 Zink summarily states:

> Clearly the evidence provided by PC is not accurately interpreted by the trial court and the court erred in it's [sic] findings. As the conclusions are based on erroneous findings, to decrease duplication of arguments Zink relies on the arguments presented in this briefing concerning the trial courts conclusions and orders as well as any findings not clearly identified in this section of this voluminous case consisting of 4-5 separate and individual causes of action (PC, Does L-O, Doe D, Doe G and Doe C).

Although this paragraph is difficult to understand, it appears Zink is asking this court to comb the record to determine whether findings were properly entered. It also asks this court to guess which findings Zink is questioning. Simply assigning error, without more, is insufficient. *Cowiche Canyon Conservancy*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992)(an appellate court will not consider an assignment of error that is not supported by citations to the record); *Camer v. Seattle Post-Intelligencer*, 45 Wn.App. 29, 36, 723 P.2d 1195(1986) (contentions unsupported by argument or citation of authority will not be considered on appeal).

Further, "contentions unsupported by argument or citation of authority will not be considered on appeal." *Camer v. Seattle Post-Intelligencer*, 45 Wn. App. 29, 36, 723 P.2d 1195, 1200 (1986) (*citing* RAP 10.3(a)(5); *Top Line Equip. Co. v. National Auction Serv.*, 32 Wash.App. 685, 692, 649 P.2d 165 (1982). It is not the function of an appellate court "to comb the record with a view toward constructing arguments for counsel." *In re Estate of Lint*, 135 Wn.2d 518, 532, 957 P.2d 755 (1998); see RAP 10.3(a)(6).

a. No Duty to Provide Records in Electronic Drop Box or Via Email.

The opening brief provides no citation to authority or application of the facts regarding how requested records were to be produced. Instead, the only briefing is the following two lines:

> The trial court found that PC did not have to provide records in the format requested. (CP 26787-81 [sic]: FOF VI.1-X.4) The evidence clearly shows that the PC was capable of communicating via e-mail and transmitting the requested records via electronic transfer or CD at a much reduced rate than claimed by PCPAO.

(And)

> There are genuine issues of material fact precluding the trial court from dismissing the claims of failure to provide records in the requested format.

(Opening Brief of Appellant at pg. 75-76).

Zink does not present to this Court any legal argument regarding why an agency must provide records in the format she requests (presumambly electronic transfer). *See* Opening Brief at 75-76.

The trial court properly concluded that PCPAO's offered method of production (inspection, U.S. mail, fax, or CD) was what is "reasonable and technically feasible" under the act. CP 2350. Specifically, the trial court found that "[i]t is reasonable for an agency like Pierce County to have a request and delivery method for public records that allows it to track both receipt of requests and outgoing productions." CP 2350. And that "[d]elivery via fax, US mail, and CD/DVD, allows them to control." *Id.*

Here, the record shows Zink originally requested that the responsive record be produced via email or fax (CP 1697; 1705) and later Zink requested that the copies be sent via email or placed in "the cloud." CP 1701. PCPAO agreed to produce the records either for inspection, hard copy, or electronically via fax or CD. CP 1700-01, 1725-26, 1734. The rates were quoted and explained for each method.[14] *Id.* The record shows that PCPAO did not produce records by email or "cloud-based drop boxes." CP 1699.

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[14] Because Zink broadened the scope of her request prior to any records being produced, a second set of estimates costs was sent to her. CP 1701, 1734-35.

Courts have determined that government agencies have no duty to provide records electronically, unless electronic metadata is requested, under the PRA. *See Mitchell v. Washington State Dep't of Corr.*, 164 Wn. App. 597, 606–07, 277 P.3d 670 (2011), *as amended on reconsideration in part* (Dec. 6, 2011) ("[A]gencies have no statutory duty to disclose records electronically under the PRA . . . ").

Despite this distinct lack of a duty to provide such records electronically, courts may order an agency to provide the records in electronic format if so requested, and if reasonable and technically feasible. *See Mitchell v. State, Dep't of Corrections*, 164 Wn. App. 597, 607, 277 P.3d 670 (2011) ("[U]nder this ["fullest assistance"] duty and under the guidance of the Attorney General's model rules, a trial court may require an agency to disclose records electronically if it is reasonable and feasible to do so") (citing *Mechling v. City of Monroe*, 152 Wn. App. 830, 849–50, 222 P.3d 808); *Resident Action Counsel v. Seattle Housing Authority*, 177 Wn.2d 417, 448, 327 P.3d 600 (2013) (affirming trial courts granting of injunctive relief against housing authority, including order that housing authority produce records in electronic format).

There is no legal authority to support the position that where an agency has offered responsive records in paper or electronic format (CD/DVD), the agency is not providing full assistance to the inquirer

under the requirements of the PRA. Indeed, appellant cites to no supporting authority. This conclusion is supported by the WSBA Washington Public Records Act Deskbook, which states "An agency should produce copies of electronic records in the method requested by the requestor . . . . [I]f the requestor instead requests the records by email, the agency should comply if reasonable and electronically feasible. Alternatively, production may be made on CD or other electronic medium." Deskbook at 6-57.

In the present case, PCPAO offered to provide the records as required by law: the requestor could view the records for free, or the requestor could obtain paper copies of the records upon payment of the printing and labor charges. CP 1700-01, 1725-26, 1734. However, PCPAO also offered to provide the records to the requestor in electronic form—on a CD/DVD or via fax. *Id.*. These facts indicate that the County was fully assisting the requestor to obtain the records that she wanted as concluded by the trial court.[15]

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[15] Zink appears to argue that because her mailing address was transposed in correspondence, that this illustrates the ineffectiveness of US mail. (Opening Brief at 76-77). However, the trial court properly found that the transposing of numbers was a clerical error and that "to the extent Ms. Zink did not immediately receive communications, this error was invited by her failing to make the original request in the format required by Pierce County, which is to make a request via fax/ and/or US post service and provide with her request her correct return address." CP 2351. These findings are supported by the record. CP 2204-2205 (Dec. of Theresa Brown outlining how the request came in and how they responded to it). Zink's continued back and forth communication with PCPAO shows that she was in fact receiving the mailings in spite of the clerical error. CP 1700-1703; 2204-

Furthermore, scanning and emailing the large quantity of responsive documents in this case is technically infeasible. As most email systems do not allow for the transmission of large data files, the County would likely have been required to send a significant number of emails with smaller quantities of records. CP 1699-1700 (outlining that e-mail systems have limited file attachment capacity and prevent the office from sending voluminous public records files). Cloud-based systems are also unreliable for delivering of documents and are not managed or supported by the County IT department. *Id. See* CP 2218, 2234-2250 (outlining difficulties PCSD experience with Filelocker and emails). Cloud or – email production is unreasonable where the County could provide the same documents in an equally effective electronic format on a CD/DVD. Further, the offer to produce in CD/DVD format is consistent with the PCC 2.04.070, which provides for the calculation of costs for "electronic records" in the format of CD-ROM. CP 1699, 1722-23.

b. Copy Costs Were Reasonable

On appeal, Zink argues that the trial court improperly found that the copy costs were reasonable because "PC did not provide Zink with a statement of factors used to determine the cost for providing the records

2205 (no record of returned mail).

on a CD or through electronic transfer and that there were genuine issues of material fact with respect to costs." (Opening Brief at 75-76).

"Since the PRA allows a requestor to either inspect the records or request copies, a requestor may elect merely to inspect the records rather than bear the cost of copies." *Benton Cty. v. Zink*, 191 Wash. App. 269, 282, 361 P.3d 801, 807 (2015), *review denied*, 185 Wash. 2d 1021, 369 P.3d 501 (2016)(*citing* RCW 42.56.120). "A reasonable charge may be imposed for providing copies of public records[,] which charges shall not exceed the amount necessary to reimburse the agency ... for its actual costs directly incident to such copying." RCW 42.56.120 (emphasis added); *See Also* RCW 42.56.070(7) (outlining how agencies shall make available for public inspection a statement of the actual per page cost or other costs for providing photocopies and how to determine cost per page). PCC and the Prosecuting Attorney's Office Statement of Factors also details how the office calculates a per-hour labor rate for production via fax or CD. CP1698, 1699, 1718-1719 (Statement of Factors); CP 1721-23 (PCC 2.04). Both of these documents were provided to Zink. CP 1701-02, 1732-1740 (letter sent to Zink with the Statement of Factors and PCC attached).

Here, the trial court's findings regarding costs are supported by substantial evidence. *See* CP 2348-2349 (FOF VIII.1, IX.1-3; CP 2353

COL 2). The record shows that Ms. Glass's declaration clearly lays out the method employed for calculating copy costs. *See* CP 1698-1699 (detailing the exact formula used to calculate costs, including that for paper copies the $.015 per copied page per RCW 42.56.120 applies and that if an electronic format is requested, that is done by CD or fax and is conducted pursuant to the PCC 2.04). The PCPAO gave Ms. Zink proper notice of the costs to be charged should she wish to receive copies of the request. CP 1701, 1734-35. Zink declined to do so. Thus Zink's argument at page 75 that "Pierce County did not provide Zink with a statement of the factors used to determine the cost for providing the records on a CD," is an inaccurate statement of the record. There was no violation of the PRA for charge of excessive costs and the trial court's findings are supported by substantial evidence.

c. No requirement to communicate via email versus US mail.

Zink makes a vague passing reference to the fact that "PC was capable of communicating via e-mail" (Opening Brief at 75). She then cites to RCW 42.56.080 in support of the argument that she could send in a public records request in any format she wanted to, including via email. (Opening Brief at 75-76). First, and most importantly, this was never raised as a counterclaim against Pierce County. *See* CP 1074-1088

(Counterclaim). Therefore, Zink may not raise this issue for the first time on appeal. RAP 2.5(a).

Even if properly raised, under the PCC, PCPAO accepts public records requests by personal delivery, U.S. mail, or fax. (CP 2204, 2207). Zink did not attack below, or on appeal, the PCC. Also, contrary to appellant's argument on appeal, RCW 42.56.080, does not provide that agencies must receive requests in methods other than mail. *See* RCW 42.56.080, *emphasis added* ("Agencies shall honor requests received by mail for identifiable public records unless exempted by provisions of this chapter."). Finally, the issue is moot where it is clear that Pierce County accepted her public records request, regardless of the method they came in as. CP 1697-1703; 2204-2205.

d. Whether the five day rule was complied with was not raised below and is a red herring on appeal.

Zink devotes an entire page of her substantive brief to whether or not there was substantial evidence to support when her different PRA requests came in to PCSD and PCPAO. Opening Brief of Appellant at page 73.

Whether the five day rule was complied with under RCW 42.56.520, was never raised below, nor did Zink raise any claim regarding her request for third party notification letters. CP 1074-1089.

Interestingly, on appeal, Zink also does not argue that the five day letter rule was violated. The only PRA violation Zink has ever claimed is whether the agencies improperly withheld records and failed to provide an exemption log. *Id.* Therefore, it is unclear why Zink assigns error to these findings. Further, although Zink argues that the trial court's finding that PCSD received the request on October 6th, and that the actual request came in on October 3rd, the record supports otherwise. *See* CP 1603-04, 1611-14 (showing a fax transmittal on Friday October, 2014, at 4:55 p.m., after close of business); CP 1604 (five date letter); *See also* PCC 2.04.030 (business hours are 8:30 a.m. - 4:30 p.m.). As to the other requests, the record supports that on November 25, 2014, PCSD received a second public records request in a clarification letter. CP 1603-1604, 1615-1616 (requesting third party notification lists and judgment and sentences). Therefore, the trial courts findings regarding when the requests came in (CP 2341), although immaterial to this court's legal determination, are supported by substantial evidence.

C. SSOSA evaluations are not confidential health care information subject to the disclosure restrictions of the Health Care Information Act.

Introduction to SSOSA and SSODA.

A SSOSA disposition requires a sentencing court suspend a convicted sex offender's presumptive standard range or indeterminate

sentencing range and instead impose from zero but not more than twelve months of incarceration. RCW 9.94A.670(4)-(5)(a). The court must additionally impose up to five years of sex offender treatment, a term of community custody, and order other affirmative conditions or prohibitions relating to precursor activities or sex offense behaviors identified in a SSOSA evaluation. RCW 9.94A.670(5)-(6).

In determining whether to grant a SSOSA, a sentencing court must evaluate a number of statutory factors. RCW 9.94A.670(4). The court is required to consider a written SSOSA evaluation that assesses "the offender's amenability to treatment and relative risk to the community." RCW 9.94A.670(3) (emphasis added). The evaluation must provide a proposed treatment plan that details "specific issues to be addressed in the treatment and description of planned treatment modalities," monitoring plans, length of treatment, and "an identification of specific activities or behaviors that are precursors to the offender's offense cycle, including but not limited to, activities or behaviors such as viewing or listening to pornography, or use of alcohol or controlled substances." RCW 9.94A.670(3)(b). The content of a SSOSA evaluation is defined by statute and amplified by Department of Health regulations. RCW 9.94A.670(3)(a)-(b); WAC 246-930-320(2)(a)-(g).

SSOSA evaluations are conducted by certified sex offender treatment providers (SOTP) who understand that the process is forensic and requires written "conclusions and recommendations" submitted to the court concerning diagnostic impressions, propriety of community treatment, and community risk factors - all designed to assist the court in its sentencing decision. WAC 246-930-320(2)(f). The SOTP must be familiar with the statutory requirements for assessments, treatment plans, and reports to the court under SSOSA and SSODA. WAC 246-930-310(2)(c). Providers are aware that the ability to maintain confidentiality concerning a SSOSA/SSODA offender is limited by "the scope of statutory responsibilities" imposed on the provider by SSOSA/SSODA laws. WAC 246-930-310(2)(d). Prior to commencing a SSOSA evaluation, or sex offender treatment, providers are required to "insure" that a SSOSA "client fully understands the scope and limits of confidentiality" with the provider, WAC 246-930-310(2)(d), and that "disclosures made by the client" will be documented by the provider in a written SSOSA evaluation report to be disclosed to the court.[16] WAC 246-930-310(3). Once completed, SSOSA evaluations are received by sentencing judges, prosecutors, DOC presentence investigators, and

[16] Pursuant to DOH regulations for SSOSA, a "client" is "a person who has been investigated by law enforcement or child protective services for committing or allegedly committing a sex offense, or who has been convicted of a sex offense."

defense counsel prior to imposition of sentence. At that time the evaluation becomes a public document subject to comment in open court and public view. The victim of a convicted sex offender has a statutory right to address the court concerning whether a SSOSA should be granted and is unrestricted in the ability to view and comment upon the disclosed SSOSA evaluation. RCW 9.94A.670(4).

The court has discretion to order a second SSOSA evaluation of the defendant's amenability to treatment. RCW 9.94A.670(3)(c).The court must do so when requested by a prosecutor. *Id.*

If a SSOSA is granted by the court, the offender's treatment provider may not be the same person who examined the offender and reported a written SSOSA evaluation to the court. RCW 9.94A.670(13). Sex offender treatment providers (SOTP) are required to submit quarterly SSOSA reports on the offender's progress in treatment to the court, defense counsel, the prosecutor, and the supervising DOC community corrections officer. RCW 9.94A.670(8)(a); WAC 246-930-010(10). The SOTP is mandated to prepare a quarterly progress report that documents any "treatment activities," any "changes in the treatment plan," "client [offender] compliance with requirements, and treatment progress" and these reports "Shall be made in a timely manner to the court and parties." WAC 246-930-340 (1)(c) (emphasis added). Further, disclosures

concerning the offender's treatment is not limited to information that the SOTP chooses to include in a written progress report. Department of Health regulations require that, "Providers shall provide additional information regarding treatment progress *when requested by the court or a party*." WAC 246-930-340(1)(c) (emphasis added). Department of Health regulations governing SSOSA and SSODA do not require that the SOTP obtain either an offender's consent or a court order for treatment disclosures to those parties. Consequently, every aspect of the offender's course of treatment under a SSOSA is subject to continual disclosure to a court, prosecutor, or DOC community corrections officer when any of those individuals makes a request for it – without limitation under the HCIA.

In addition to receiving quarterly reports, the court must conduct a public hearing on the subject of the offender's progress in treatment at least once annually and provide advanced notice to victims. RCW 9.94A.670(8)(b). At that hearing victims have a statutory right to make statements to the court regarding the offender's treatment and supervision. *Id.* The SSOSA statute does not close annual SSOSA treatment hearings to any member of the public. Nor does the SSOSA statute restrict a victim's ability to access the treatment reports filed with the court or to obtain from a prosecutor or corrections officer any "additional

information" about treatment that those parties obtained upon request from the treatment provider.

Treatment providers must report to the court in a timely manner regarding the offender's compliance with treatment and monitoring requirements, and make recommendations regarding modification of supervision conditions. WAC 246-930-338(2). A treatment provider must communicate any permanent changes in the treatment plan or changes that may reduce community safety to the court, prosecutor, and DOC/JRA supervising officer before implementation. See WAC 246-930-330(2)(a); RCW 9.94A.670(5)(c).

SSOSA participants have the right to refuse therapy and return to court for review. WAC 246-930-330(3)(b). A sentencing court may revoke the suspended sentence under SSOSA at any time if it is reasonably satisfied that an offender has violated a condition of his sentence or failed to make satisfactory progress in treatment. RCW 9.94A.670(11).

Prior to any termination of sex offender treatment under SSOSA, the SOTP must provide a written report to the court and the parties "regarding the offender's compliance with treatment and monitoring requirements. RCW 9.94A.670. Additionally, the court may "order" another evaluation at that time regarding the advisability of termination of

treatment that must be conducted by an SOTP other than the offender's current treatment provider. RCW 9.94A.670(9).

SSOSA Evaluations are Forensic Sentencing Documents, not Confidential Health Care Records

The PRA provides that Chapter 70.02 applies to public inspection and copying of health care information of patients." RCW 42.56.360(2). However, SSOSA records are not confidential "health care information" under the general Health Care Information Act , but is instead public records used for sentencing purposes defined and controlled by the more specific Special Sex Offender Sex Alternative SSOSA provision of the Sentencing Reform Act, RCW 9.94A.670. Even if a SSOSA evaluation was held to qualify as "health care information" as defined by the HCIA, the Sheriff's Department is not subject to HCIA disclosure restrictions because it is neither a "health care provider" nor "health care facility" pursuant to RCW 70.02.030. Nor is the Sheriff's Department a "provider for mental health services" pursuant to RCW 70.02.230.

The purpose of a SSOSA evaluation is not diagnosis or treatment of a defendant sex offender. Rather, from inception the evaluation is written for a sentencing judge for the court "to determine whether the offender is amenable to treatment." RCW 9.94A.670(3). In order to make that determination the court "may order an examination" for that purpose.

Id. The content of a SSOSA evaluation is defined by statute and DOH regulations. RCW 9.94A.670 (3)(a)(i)-(v); WAC 246-930-320. The SSOSA statute directs that "[t]he examiner shall assess and report regarding the offender's amenability to treatment and relative risk to the community." RCW 9.94A.670(3)(b) (emphasis added). In undertaking a SSOSA evaluation for purposes of an offender's amenability to treatment and risk to the community, the sex offender treatment provider is manifestly functioning as a forensic examiner and witness for the benefit of a court tasked with a sentencing determination. Thus, while a SSOSA evaluation may provide a collateral "health" benefit to an offender, its legislative purpose is for public judicial use that is in no manner confidential under the HCIA or RCW 9.94A.670.

Sex offenders know prior to the commencement of a SSOSA evaluation that the treatment provider will report disclosures and make a written report of the evaluation to the court. That advisement by the treatment provider is mandated by Department of Health regulation. WAC 246-930-340(3)(a). Thus, while the offender may not know what portions of a SSOSA evaluation will be discussed by a judge or lawyers in open court, or the number of victim family members and friends who will be present for sentencing, or the number of lawyers or citizens who will be present for other proceedings, or the number of media members who will

be present to report on the court's discussion of the evaluation and the sentence imposed, the offender nonetheless knows the evaluation will not be confidential from any of those individuals. The issue of how widely a SSOSA evaluation is disseminated to members of the public or the media after its use in sentencing is unrelated to whether the document is confidential. Once judicially reviewed for sentencing purpose it is not confidential whether possessed by a superior court clerk or a county sheriff.

In *Hines v. Todd Shipyards*, 127 Wn.App. 356, 112 P.3d 522 (2005), the court rejected appellant's argument that his prior employer, who required a drug test as a condition of employment and disclosed the test results to a subcontractor, was a "health care provider" under the HCIA, RCW 70.02. Affirming the trial court's dismissal on summary judgment, the Court of Appeals concluded:

> Todd is not a "health care provider," the results of a drug screening test that Todd requires employees to obtain after an on-the-job injury is not "health care information" and the drug screening test was not administered to Hines as a "patient." Todd's drug screening test was a condition of Hines' employment agreed to in the CBA.

Hines, at 366–67. The court noted, "[t]he Legislature defines 'health care provider' as "a person who is licensed, certified, registered, or otherwise authorized by the law of this state to provide health care in the ordinary

course of business or practice of a profession." Id. citing RCW 70.02.020(7). The court further observed that under the HCIA, "'Health care' is 'any care, service, or procedure provided by a health care provider: (a) [t]o diagnose, treat, or maintain a patient's physical or mental condition; or (b) [t]hat affects the structure or any function of the human body.'" *Id.* at 367-68. Though "Hines tested positive for cocaine," *Id.* at 362, which would be an apparent "diagnosis" of his "physical condition" at that time, it was not deemed "health care." The court stated, "the purpose of the drug screening test was not health care or medical treatment" even though Hines was later referred to or began treatment at a drug recovery facility. Id. at 368.

Similarly, a SSOSA evaluation is not for the purpose of treatment per se. Rather, the SSOSA evaluation "was created to aid a court in its sentencing decision[,]" *Koenig v. Thurston County*, 175 Wn.2d 837, 849-50, 287 P.3d 523 (2012), and developed by the legislature "for first time offenders to prevent future crimes and protect society." Id. at 847.

A SSOSA evaluation is "required to establish eligibility for the alternative sentencing option." *State v. Young*, 125 Wn.2d 688, 695, 888 P.2d 142 (1995). By design, the document functions as an instrument to assist a sentencing court in determining whether to impose the alternative sentence which, if granted, would require the offender to submit to court

ordered treatment. RCW 9.94A.670(3). If a SSOSA is imposed, the treatment provider would be required to continually disclose details of the offender's course of treatment by means of quarterly progress reports and annual review hearings conducted in open court with opportunity for victim participation. RCW 9.94A.670(8). Hence, an offender knows that SSOSA treatment details will be publicly monitored by the court, prosecutor, supervising corrections officer, victims, and any other member of the public who either read treatment reports filed with the court or is present at a review hearing where a treatment provider can be required to testify concerning treatment details. Alternatively, a judge could review a SSOSA evaluation, conclude that SSOSA would be contrary to the interests of a victim or the public, and result in imposition of a traditional sentence without any court ordered sex offender treatment. Indeed, because a sentencing judge may order a SSOSA examination without an offender's request or consent, the evaluation report could recommend against SSOSA due to any number of offender or community safety criteria that must be considered in the report to the court. The SSOSA evaluation is not confidential "health care information" restricted by RCW 70.02 when it is published to a sentencing judge either by an offender's request or by court order, nor is it so when filed with the superior court clerk or held later by a county sheriff's department.

Moreover, the Supreme Court implicitly rejected the trial court's health care ruling four years ago. In *Koenig v. Thurston County*, 175 Wn.2d 837, 849-50, 287 P.3d 523 (2012), *reconsideration denied, as amended* (Dec. 18, 2012), the court considered whether a SSOSA evaluation in the possession of the Thurston County Prosecutor's office in connection with a SSOSA sentence was within the scope of the PRA investigative record exemption. *Id.* at 847-48. The court's majority rejected the argument, declining to exempt SSOSA documents because they are "created to aid a court in its sentencing decision[,]" which included victim impact statements also at issue in the case. *Id.* at 849-50.

In his lone dissent, Justice Chambers stated he would hold the SSOSA evaluation is an investigative record, and also opined that "serious privacy concerns are implicated by the release of a SSOSA evaluation to the public" because the document contains "a detailed sexual history section; mental health history; medical history, [and] drug and alcohol history . . ." *Id.* at 854. He concluded his dissent by urging the legislature to "amend the [PRA] act and establish appropriate protections" for SSOSA evaluations. *Id.*

To date, the legislature has taken no action in response to *Koenig*. It is presumed prosecutors and law enforcement agencies have adhered to *Koenig* and disclosed SSOSA evaluations since the decision issued.

Despite the legislature's decision to let the opinion stand, sex offenders continue to act in their self-interest and pursue the clement SSOSA option undeterred by the disclosure mandate of *Koenig*. *See also In re Meyer*, 142 Wn.2d 608, 16 P.3d 563 (2001) ("the public interest in information about potentially dangerous individuals in local neighborhoods is legitimate" and access to records on sex offenders can be obtained "from public sources like the court files on these individuals[.]")

D. Assuming SSOSA evaluations qualify as health care information under the HCIA, the Pierce County Sheriff's Department is neither a health care provider nor a health care facility subject to HCIA disclosure provisions.

The Health Care Information Act (HCIA) defines a "health care provider" as "a person who is licensed, certified, registered, or otherwise authorized by law of this state to provide health care in the ordinary course of business or practice of profession." RCW 70.02.010(18). HCIA defines a "health care facility" as "a hospital, clinic, nursing home, laboratory, office, or similar place where a health care provider provides health care to patients." RCW 70.02.010(15). The HCIA generally restricts disclosures made by a either a health care provider, an individual who assists a health care provider in the delivery of health care, or an agent and employee of a health care provider about a patient to another person in the absence of written consent by a patient. RCW 70.02.020.

The HCIA provides that only under limited circumstances may a "health care provider" or "health care facility" disclose "health care information" in the absence of "patient" consent. RCW 70.02.050. A public record request does not qualify as a circumstances permitting disclosure absent consent if the entity is a health care provider or health care facility. RCW 70.02.050. Additionally, the HICA restricts certain disclosures of "information and records relate to mental health services." RCW 70.02.230. However, that limitation pertains to "mental health information contained in a medical bill, registration records as defined by RCW 71.05.020, and all other records regarding the person maintained by DSHS or by "regional support networks and their staff, and by treatment facilities." RCW 70.02.010(21).

The Pierce County Sheriff is not a health care provider, a health care facility restricted under the HCIA. In *Fisher v. State ex rel. Dept. of Health*, 125 Wn.App. 869, 106 P.3d 836, Department of Health, *review denied*, 155 Wn.2d 1013 (2005) the Court of Appeals reviewed the claims of Marcy Fisher, a patient of a physician named Dr. Jeckle who was under investigation by the Medical Quality Assurance Commission. Fisher sought damages under the HCIA upon discovering that her medical records, possessed by the Office of the Attorney General while representing the Department of Health, had been released to an outside

attorney named Crotty in response to a public record request made to the Department of Health. *Id.* at 873-74. Fisher made HCIA disclosure claims against the Department of Health and the Office of Attorney General, but the Court of Appeals affirmed dismissal on summary judgment, concluding:

> By its plain language, RCW 70.02.170(1) creates a right of action solely against a health care provider or facility who has not complied. But it does not set out a right of action against any 'other person,' including a government agency.

Fisher, 125 Wn.App. at 876-77; *see also Jeckle v. Crotty*, 120 Wn.App.374, 385, 85 P.3d 931 (holding plain text of HCIA did not permit Dr. Jeckle to bring any HCIA claim based on disclosure of patient medical records against attorneys who were not health care providers or health care facilities), *review denied*, 152 Wn.2d 1029 (2004); *Hines*, 127 Wn.App. at 369 (same); *Murphy v. State*, 115 Wn.App. 297, 62 P.3d 533 (2003) (medical records of County Sheriff obtained by Washington State Pharmacy Board during its investigation and later disclosed to county prosecutor did not violate HCIA because pharmacy board was not a health care provider), *cert. denied*, 541 U.S. 1087, 124 S.Ct. 2812, 159 L.Ed.2d 249 (2004).

Significantly, the trial court made no factual finding that the Pierce County Sheriff's Department or any other county agency in possession of

SSOSA or SSODA evaluations qualifies as a "health care provider" or "health care facility" under the HCIA. Nor does the record contain evidence that would support such a finding. As law enforcement agency tasked by the Community Notification Act, RCW 4.24.550, the Pierce County Sheriff and other law enforcement agencies obtain and use these records for sex offender risk classification and community notification purposes. To that end, sheriff departments obtain SSOSA evaluations from court files, prosecutors, and or the Department of Corrections.

The trial court below entered no specific conclusion of law that the legislature's findings found in RCW 70.02.005(4) is a basis to extend HCIA disclosure duties to non-health care providers such as the Pierce County Sheriff. JOHN DOEs, in apparent recognition that the Pierce County Sheriff is not a health care provider or health care facility, identified that legislative finding in its briefing below to the trial court. In *Murphy*, *supra*, the Court of Appeals rejected the argument that policy findings in RCW 70.02.005(4) created a basis to extend a duty to comply with the HCIA upon the Washington Pharmacy Board, a non-health care provider:

> [T]his section of the statute does not purport to prohibit specific conduct. Rather, it is a general statement of legislative intent. Such policy statements do not in themselves create enforceable duties. The trial court therefore erred in concluding the HCIA created such a duty on the part of the Board.

Murphy, 115 Wn.App. at 315 (*citing Melville v. State*, 115 Wn.2d 34, 38, 793 P.2d 952 (1990).

The legislature knows how to restrict non-health care providers who possess health care information from engaging in a subsequent dissemination when it intends that result. *See e.g.* RCW 70.02.230(2)(m)(i)-(ii) (permitting prosecutors and law enforcement agencies to obtain "information and records related to mental health services" in the form of involuntary commitment order records for purposes of enforcing and prosecuting felony firearm possession violations under RCW 9.41.040(2)(a)(ii), and limiting further dissemination of those records to defense counsel, judge, and jury as required by court rule).

E. The trial court erred in ruling that PRA disclosure of SSOSA evaluation sentencing records held by a sheriff requires offender consent under the Health Care Information because it conflicts with mandatory disclosure provisions of the SSOSA statute and leads to absurd results.

In construing a statute, "a reading that results in absurd results must be avoided because it will not be presumed that the legislature intended absurd results." *State v. J.P.*, 149 Wn. 2d 444, 450, 69 P.3d 318, 320 (2003). The trial court's determination that the consent provisions of RCW 70.02 act to qualify a sheriff's ability to release SSOSA evaluation sentencing records will lead to absurd results never intended when the

legislature enacted the SSOSA sentencing option.

The Health Care information Act, RCW 70.02, generally restricts the ability of a "health care provider" or "health care facility" to disclose "health care information" absent the consent of a "patient." See RCW 70.02.030. On the other hand, the legislature provided in RCW 9.94A.670 that SSOSA examinations ordered by the court must be reported to the court in a written evaluation. RCW 9.94A.670(3)-(4). If a court grants a SSOSA option, it must order treatment for up to five years. RCW 9.94A.670(5)(c). During court ordered SSOSA treatment a sex offender treatment provider must send the offender's supervising DOC officer a community protection contract detailing treatment rules and requirements, and "shall submit quarterly reports on the offender's progress in treatment to the court and the parties." RCW 9.94A.670(8)(a) (emphasis added).

Yet, the HCIA is completely silent on SSOSA examination reports, SSOSA treatment quarterly progress reports, SSOSA annual review reports, the obligation of sex offender treatment providers to submit a report to a court prior to SSOSA treatment termination, or the requirement that sex offender treatment providers make additional detailed disclosures about the offender's course of treatment based on merely "the request" of a judge, prosecutor, or probation officer. The SSOSA provisions could not function as intended if a defendant could invoke RCW 70.02 as a privilege

to thwart any of these mandated disclosures. Further, the Legislature has charged sheriff departments and other law enforcement agencies with the duty to register sex offenders and "assign a risk level classification to all offenders required to register" using multiple sources of information. RCW 4.24.550(6)(a). SSOSA and SSODA evaluations are a critical tool used by a sheriff's department to accomplish offender risk classification in accordance with the legislature's mandate. In *State v. Sanchez*, 177 Wn.2d 835, 306 P.3d 935 (2013), the State Supreme Court recognized that a SSODA evaluation [and presumably a SSOSA evaluation] is essential both "relevant" and "practically dispositive" is a law enforcement agency's task of assigning the appropriate risk level classification to a convicted sex offender. Id. at 844-45.

If the trial court's ruling adopting the HCIA as a disclosure restriction is upheld, an offender on active SSOSA with a duty to register may attempt to deny a county sheriff from obtaining SSOSA records for purposes of offender risk classification and community notification by asserting a lack of offender consent under RCW 70.02. The legislature nowhere provides offenders such a privilege within RCW 9.94A.670, nor is there any provision within it that designate as confidential SSOSA evaluations or other SSOSSA treatment records held by the court, prosecutor, department of corrections, or law enforcement agencies tasked

with risk assessment and offender classification. The legislature knows how to restrict the authority of a prosecutor or law enforcement agency to further disseminate a particular class of records in its possession when it intends that result. See e.g. RCW 70.02.230(2)(m)(ii) (granting prosecutors access to mental health records to prosecute a felony firearm violation under RCW 9.41.040 and the right to disclose such information to a judge and defense counsel but prohibiting any further release); RCW 68.50.105(1) (authorizing a prosecuting attorney or law enforcement agency to obtain autopsy records but designating the document as otherwise "confidential" prohibiting subsequent dissemination).

The general-specific rule canon of statutory construction applies if, after attempting to read statutes governing the same subject matter in *pari materi*, a court concludes that statutes conflict to the extent they cannot be harmonized. *O.S.T. ex rel G.T. v. Blueshield*, 181 Wn.2d 691, 701, 335 P.3d 416 (2014). "It is a fundamental rule that where the general statute, if standing alone, would include the same matter as the special act and thus conflict with it, the special act will be considered as an exception to, or qualification of, the general statute, whether it was passed before or after such general enactment." *Wark v. Wash. Nat'l Guard*, 87 Wn.2d 864, 867, 557 P.2d 844 (1976); *State v. Conte*, 159 Wn.2d 797, 803, 154 P.3d 194 ("'It is elementary that a general statute or rule, though subsequently

enacted or promulgated, does not affect a special statute or rule.'"), *cert. denied*, 552 U.S. 992, 128 S.Ct. 512, 169 L.Ed.2d 342 (2007).

If SSOSA records are "health care information" subject to the general provisions of the HCIA, RCW 70.02 et. seq., then the consent requirements of that act conflict with the more specific provisions of SSOSA pursuant to RCW 9.94A.670, which mandates disclosure of SSOSA evaluation and treatment report records to judges, prosecutors, and DOC personnel without limitation upon public access or subsequent dissemination. As a consequence, the general-specific rule compels finding that RCW 9.94A.670 controls as the more specific statute that vitiates any need to obtain an offender's consent under the HCIA as a prerequisite to obtaining access to SSOSA sentencing records. Further, no provision of RCW 9.94A.670 restricts the ability of a court, prosecutor, DOC presentence investigation author, or DOC supervising corrections officer to provide these records to sheriff departments or other law enforcement agencies tasked with offender risk classification and community notification. No provision of RCW 9.94A.670 restricts a law enforcement agency's ability to gather SSOSA evaluations or subsequent treatment progress reports from public court files. Lastly, no provision of RCW 9.94A.670 restricts the ability of any prosecutor, DOC officer, or law enforcement agency in the possession of a SSOSA evaluation or other

SSOSA sentencing documents from making additional disseminations of these public records under the PRA.

F. Doe ex rel. Roe v. Washington State Patrol, held that RCW 4.24.550 is not an "other statute" permitting exemption and also makes clear that Zink is not entitled to costs or fees as the prevailing party.

As this case was pending in the trial court, Zink was simultaneously litigating a similar issue out of King County Superior Court, which resulted in the grant of a direct appeal to the Washington Supreme Court. *See Doe ex rel. Roe v. Washington State Patrol.*[17] As Zink correctly notes, the issuance of the Supreme Court's decision in *Doe v. WSP*, is dispositive to some of the issues before the court; namely whether RCW 4.24.550 is an "other" exemption preventing disclosure under the PRA. In *WSP*, the court held that RCW 4.24.550(3)(a), is not an "other statute" exemption under RCW 42.56.070(1) of the PRA. 185 Wn.2d at 368. The court also rejected the argument that Zink was entitled to have the court assess per diem penalties, attorney's fees and costs as the prevailing party. 374 Wn.2d at 387. The court determined that although Zink may have prevailed with her argument, she did not "prevail" against an agency where the agencies took the position that the records were subject to disclosure. 374 Wn.2d at 386. The court likewise held that she

[17] *Doe ex. Rel. Roe v. Washington State Patrol (WSP)*, 185 Wn.2d 363, 374 P.3d 63 (2016).

was not entitled to costs and fees because the agency allegedly wrongfully delayed release of records by giving third party notice. *Id.* at 387.

Similarly here, Pierce County as an agency, never took the position below that RCW 4.24.550 is an "other statute," and as argued *supra* appropriately gave third party notice. Below, Pierce County *joined* in Zink's argument that RCW 4.24.550 was not an "other statute" permitting exemption of some of the records requested. *See e.g.* CP 712-717.[18] Therefore, there is no merit to Zink's argument that she is entitled to costs and fees. Also, as argued *supra*, Pierce County did not give third party notice to delay production.

However, Pierce County must clarify for this court that Zink narrowed her request below and *withdrew any request for databases* or a broad request for registration records in general. CP 2346 (FOF IV.6); CP 2069. Zink incorrectly summarizes what is left for production in this case. (Opening Brief at 78)(listing that registration records, *list and/or database of sex offenders registered in PC*, list of persons notified of Zink's request; and Sentencing, Judgment and Plea Agreements documents pursuant to RCW 9.94A.475 and 480, are left for production). Further, Zink never requested "plea agreements." CP 2341, FOF I.1.; CP 2347 (FOF VI.1).

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[18] For this reason, Pierce County does not provide any briefing to the contrary of Zink's assertions regarding the classification of conviction/sentencing/plea records. *See* Opening Brief of Appellant at p. 91-93.

Therefore, in the event of remand under *Doe v. WSP*, databases, plea agreements, and "registration records in general" should not be at issue as part of this request.

G. RCW 42.56.230(7)(A) exempts only records submitted to DOL for purposes of proving identity in an application for a License or Identicard and does not extend to sex offender records held by the county sheriff for offender risk classification and public notification.

The trial court erred in prohibiting Pierce County from disclosing sex offender records "unless" it redacted "all identifying information of the type set forth in RCW 42.56.230(7)(a), which provides an exemption for information of the type required to apply for a driver's license or identicard such as 'any record used to prove identity, age, residential address, social security number . . ." The trial court's order is premised upon its legal determination that "Sex offender registration forms, which contain the offender's specific residential address and other information of that type, are exempt under RCW 42.56.230(7)(a)." Though no appellate court has construed this statute to date, the trial court's directive to apply it as a basis to exempt personal identifiers contained in sex offender records held by a county sheriff is contrary to the statute's plain text and the PRA's rules of construction.

The text of the PRA directs that it be liberally construed and its exemptions narrowly construed to assure that the public interest will be

fully protected. *Doe ex. Rel. Roe. V. Washington State Patrol*, 185 Wn.2d 363, 371, 374 P.3d 63 (2016); RCW 42.56.030. The primary objective in statutory interpretation is to ascertain and give effect to the intent of the Legislature. *Koenig v. City of Des Moines*, 158 Wn.2d 173, 181, 142 P.3d 162 (2006). The meaning of a statute is a question of law reviewed de novo. *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002); *Nat'l Elec. Contractors Ass'n, Cascade Chapter v. Riveland*, 138 Wn.2d 9, 19, 978 P.2d 481 (1999). In determining legislative intent, the court first looks to the plain language and ordinary meaning of the statute. *Nat'l Elec.*, 138 Wn.2d at 19, 978 P.2d 481. If the meaning of the statute is plain on its face, the inquiry ends. *Campbell & Gwinn*, 146 Wn.2d at 9–10, 43 P.3d 4. A court cannot add words or clauses to an unambiguous statute when the legislature has chosen not to include that language, *State v. Delgado*, 148 Wn.2d 723, 727, 63 P.3d 792 (2003), nor delete language from an unambiguous statute. *State v. J.P.*, 149 Wn. 2d 444, 450, 69 P.3d 318, 320 (2003). Statutes are to be construed to give effect to all language used, rendering "no portion rendered meaningless or superfluous." *Prison Legal News, Inc. v. Dep't of Corrections*, 154 Wn.2d 628, 643–44, 115 P.3d 316 (2005).

RCW 42.56.230(7) provides as follows:

> Any record used to prove identity, age, residential address, social security number, or other personal information required to apply for a driver's license or identicard.

(emphasis added). The text creates a privacy right permitting DOL to exempt only those "records" actually "used to prove" or establish an applicant's date of birth, address, or other personal identifying information required to apply for a driver's license or identicard. The statute appears to be only available as an exemption to DOL. For example, it would permit DOL to exempt a birth certificate submitted to prove the applicant's age, or a county assessor's property tax notice submitted to prove residential address. The statute nowhere authorizes agencies other than DOL to exempt records "of the type set forth in RCW 42.56.230(7)(a)" that contain an individual's identity, age, address, driver's license numbers, email addresses, phone numbers, vehicle registrations or "title numbers" employer information or photographic images. The trial court's construction permitting exemption of all "personal identifying information" in any public record renders superfluous the text "used to prove" and "required to apply for a driver's license or identicard." If the Legislature had intended to authorize such a broad exemption for personal identifying information in all public records it would have done so by more direct and unqualified text.

Evidence for a narrow reading of RCW 42.56.230(7) is found in the Final Bill Report on SHB 2729, legislation that exclusively concerned the use of DOL records. (Appendix page 1-12). That report summarized previous authority granted to DOL authorizing the issuance of an enhanced driver's license or identicard (EDL/ID) to applicants who provide DOL with proof of U.S. citizenship, identity, and state residency. The report elaborated that EDL/IDs contain an embedded radio frequency identification chip that can be read at border crossing stations. The information retrieved from the embedded chip is then compared to a Customs and Border Patrol database to verify identity for entry into the United States. The final bill report recognized that the new legislation amended the Public Records Act as follows:

> A public records exemption from disclosure is created for documents and related materials, including scanned images, used to establish identity, age, a residential address, Social Security number, or other personal information required in connection with an application for a driver's license or identicard.

SHB 2729 also created a second PRA exemption pertaining to DOL, currently codified in RCW 42.56.330(8), which exempts personally identifying information of persons who acquire and use an enhanced license or identicard that contains a radio frequency identification chip.

VII. CONCLUSION

For the aforementioned reasons, Pierce County asks this court to (1) AFFIRM the trial court's grant of summary judgment on Zink's counterclaims and Pierce County's Permanent Injunction, and (2) REVERSE the trial court's rulings on *John Doe's* Motions Summary Judgment and declaratory relief.

DATED: December 23, 2016

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Brief of Respondent/Cross Appellant Pierce County was electronically filed and delivered this 23rd day of December, 2016, by electronic mail pursuant to the agreement of parties as follows:

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NO. 48378-5

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

DONNA ZINK, Appellant/Cross-Respondent

v.

PIERCE COUNTY, Respondent/Cross-Appellant

and

JOHN DOES, Respondents

APPENDIX

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Appendix

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I hereby certify that a true copy of the foregoing Appendix was electronically filed and delivered this 23rd day of December, 2016, by electronic mail pursuant to the agreement of parties as follows:

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FINAL BILL REPORT
SHB 2729

C 200 L 08
Synopsis as Enacted

Brief Description: Addressing the reading and handling of certain identification documents.

Sponsors: By House Committee on Technology, Energy & Communications (originally sponsored by Representatives Eddy, Pedersen, Appleton, Lantz, Williams, Upthegrove, Santos, Simpson, Hasegawa, Ericks, Ormsby and Springer).

House Committee on Technology, Energy & Communications
Senate Committee on Transportation

Background:

Western Hemisphere Travel Initiative. In April 2005 the departments of State and Homeland Security announced the Western Hemisphere Travel Initiative (Initiative), which requires individuals entering or re-entering the United States to present a passport or other federally approved identification or proof-of-citizenship document.

The identification requirements of the Initiative for persons entering or re-entering the United States by land or sea became effective on January 31, 2008.

Washington's Enhanced Driver's License. In 2007 legislation was enacted that authorized the Department of Licensing (DOL) to issue a voluntary enhanced driver's license or identicard (EDL/ID) to all applicants who, in addition to meeting all other driver's license or identicard requirements, provide the DOL with proof of U.S. citizenship, identity, and state residency.

The EDL/ID uses Radio Frequency Identification (RFID) technology, a wireless technology that stores and retrieves data remotely. A RFID chip is embedded in each EDL/ID and contains a unique reference number. At the border crossing station, a RFID reader uses electromagnetic waves to energize the tag and collect this reference number. The reader converts the radio waves reflected back from the RFID tag into digital information and transmits it to the Customs and Border Protection network, which is an encrypted, secure network. The reference number is compared to the Customs and Border Protection's records to verify that an individual's identity matches the information printed on the front of his or her EDL/ID card.

The Department of Homeland Security has designated the EDL/ID as acceptable documents for the purpose of entering or re-entering the United States.

Public Records. Each state and local agency is required under the Public Records Act to make all public records available for public inspection and copying unless the record is exempted from disclosure.

Collection of Personal Information from an Identification Document. There are no state laws that prohibit or restrict a non-governmental entity from using or distributing personal information gained through an EDL/ID or other identification card or document.

Summary:

Enhanced Driver's License. A person is guilty of a class C felony if the person uses radio waves to intentionally possess, read, or capture remotely, information on another person's enhanced driver's license without that person's express knowledge and consent.

Exceptions are included for capturing the information on another person's enhanced driver's license: (1) to facilitate border crossing; (2) to conduct security-related research; and (3) for inadvertent scanning (provided that the information is promptly disclosed, and neither disclosed to any other party, nor used for any purpose).

The unlawful capture or possession of information on a person's enhanced driver's license is deemed a violation of the Consumer Protection Act.

Public Records Disclosure Exemptions. A public records exemption from disclosure is created for documents and related materials, including scanned images, used to establish identity, age, a residential address, a Social Security number, or other personal information required in connection with an application for a driver's license or identicard.

A public records exemption from disclosure is also created for personally identifying information collected through a driver's license or identicard containing radio frequency identification or similar technology used to facilitate border crossing.

Votes on Final Passage:

House	95	0	
Senate	47	0	(Senate amended)
House	94	0	(House concurred)

Effective: June 12, 2008

HOUSE BILL REPORT
SHB 2729

As Passed Legislature

Title: An act relating to identification documents.

Brief Description: Addressing the reading and handling of certain identification documents.

Sponsors: By House Committee on Technology, Energy & Communications (originally sponsored by Representatives Eddy, Pedersen, Appleton, Lantz, Williams, Upthegrove, Santos, Simpson, Hasegawa, Ericks, Ormsby and Springer).

Brief History:
Committee Activity:
Technology, Energy & Communications: 1/30/08, 2/1/08 [DPS].
Floor Activity:
Passed House: 2/7/08, 95-0.
Senate Amended.
Passed Senate: 3/7/08, 47-0.
House Concurred.
Passed House: 3/10/08, 94-0.
Passed Legislature.

Brief Summary of Substitute Bill

- Creates a class C felony for a person to intentionally possess, read, or capture information on another person's enhanced driver's license remotely, without that person's knowledge and consent.
- Creates exemptions from the Public Records Act for: (1) information required in connection with an application for a driver's license or identicard; and (2) personally identifying information collected for border crossing.

HOUSE COMMITTEE ON TECHNOLOGY, ENERGY & COMMUNICATIONS

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 11 members: Representatives McCoy, Chair; Eddy, Vice Chair; Crouse, Ranking

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This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

Minority Member; McCune, Assistant Ranking Minority Member; Herrera, Hudgins, Hurst, Kelley, Morris, Takko and Van De Wege.

Minority Report: Do not pass. Signed by 1 member: Representative Hankins.

Staff: Kara Durbin (786-7133).

Background:

Western Hemisphere Travel Initiative: In April 2005 the Departments of State and Homeland Security announced the Western Hemisphere Travel Initiative (Initiative), which requires individuals entering or re-entering the United States to present a passport or other federally-approved identification or proof-of-citizenship document.

The identification requirements of the Initiative for persons entering or re-entering the United States by land or sea take effect January 31, 2008.

Washington's Enhanced Driver's License: In 2007 the Legislature enacted ESHB 1289, which authorized the Department of Licensing (DOL) to issue a voluntary enhanced driver's license or identicard (EDL/ID) to all applicants who, in addition to meeting all other driver's license or identicard requirements, provide the DOL with proof of U.S. citizenship, identity, and state residency. The EDL/ID uses Radio Frequency Identification (RFID) technology, a wireless technology that stores and retrieves data remotely. A RFID chip is embedded in each EDL/ID and contains a unique reference number. At the border crossing station, a RFID reader uses electromagnetic waves to energize the tag and collect this reference number. The reader converts the radio waves reflected back from the RFID tag into digital information and transmits it to the Customs and Border Protection network, which is an encrypted, secure network. The reference number is compared to the Customs and Border Protection's records to verify that an individual's identity matches the information printed on the front of their EDL/ID card.

Public Records Act: Each state and local agency is required under the Public Records Act to make all public records available for public inspection and copying unless the record is exempted from disclosure.

Collection of Personal Information from an Identification Document: There are no state laws that prohibit or restrict a non-governmental entity from using or distributing personal information gained through an EDL/ID or other identification card or document.

Summary of Substitute Bill:

A person is guilty of a class C felony if the person intentionally possesses, reads, or captures remotely using radio waves, information on another person's enhanced driver's license, without that person's express knowledge and consent.

Exceptions are included for capturing the information on another person's enhanced driver's license: (1) to facilitate border crossing; (2) to conduct security-related research; and (3)

inadvertently (provided that the information is promptly disclosed, and neither disclosed to any other party, nor used for any purpose).

The unlawful capture or possession of information on a person's enhanced driver's license is deemed a violation of the Consumer Protection Act.

Public Records Act Exemptions: A public records exemption is created for documents and related materials, including scanned images, used to establish identity, age, a residential address, a Social Security number, or other personal information required in connection with an application for a driver's license or identicard.

A public records exemption is created for personally identifying information collected through a driver's license or identicard containing radio frequency identification or similar technology used to facilitate border crossing.

Appropriation: None.

Fiscal Note: Not requested.

Effective Date: The bill takes effect 90 days after adjournment of session in which bill is passed.

Staff Summary of Public Testimony:

(In support) Privacy and security are a zero-sum game. We need to attempt to lessen the damage going forward in term of privacy. The two-dimensional bar code on driver's licenses is not encrypted and the information on it can be easily captured. The radio frequency identification (RFID) tag in the enhanced driver's license also raises concerns. Information about a consumer should not be captured without the consumer's knowledge or actual consent.

The problems with RFID technology are threefold: (1) it can be read from several feet away; (2) the information is not encrypted; and (3) there is no way for the individual to know that the tag is being read at any given time.

There is an active market for difficult-to-acquire data. Many of the RFID chips cannot be encrypted in order to have a higher level of security.

A public education campaign would be helpful so that citizens and merchants are informed of this change. It may be hard for consumers to know when the provisions in this bill have been violated.

(With concerns) Financial institutions need to use and retain personal information from driver's licenses in order to comply with federal law. A technical fix is being offered to address this issue.

(Opposed) None.

Persons Testifying: (In support) Representative Eddy, prime sponsor; Jennifer Shaw, American Civil Liberties Union Washington; Magda Balazinska; Dan Kaminsky, IOActive; and Riana Pfefferkorn.

(With concerns) Gary Gardner, BECU.

Persons Signed In To Testify But Not Testifying: None.

CERTIFICATION OF ENROLLMENT

SUBSTITUTE HOUSE BILL 2729

60th Legislature
2008 Regular Session

Passed by the House January 1, 0001
Yeas 0 Nays 0

Speaker of the House of Representatives

Passed by the Senate January 1, 0001
Yeas 0 Nays 0

President of the Senate

Approved

Governor of the State of Washington

CERTIFICATE

I, Barbara Baker, Chief Clerk of the House of Representatives of the State of Washington, do hereby certify that the attached is **SUBSTITUTE HOUSE BILL 2729** as passed by the House of Representatives and the Senate on the dates hereon set forth.

Chief Clerk

FILED

Secretary of State
State of Washington

SUBSTITUTE HOUSE BILL 2729

AS AMENDED BY THE SENATE

Passed Legislature - 2008 Regular Session

State of Washington 60th Legislature 2008 Regular Session

By House Technology, Energy & Communications (originally sponsored by Representatives Eddy, Pedersen, Appleton, Lantz, Williams, Upthegrove, Santos, Simpson, Hasegawa, Ericks, Ormsby, and Springer)

READ FIRST TIME 02/01/08.

AN ACT Relating to identification documents; amending RCW 42.56.230 and 42.56.330; adding a new chapter to Title 9A RCW; and prescribing penalties.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

NEW SECTION. **Sec. 1.** The legislature finds that:

(1) Washington state recognizes the importance of protecting its citizens from unwanted wireless surveillance.

(2) Enhanced drivers' licenses and enhanced identicards are intended to facilitate efficient travel at land and sea borders between the United States, Canada, and Mexico, not to facilitate the profiling and tracking of individuals.

(3) Easy access to the information found on enhanced drivers' licenses and enhanced identicards could facilitate the commission of other unwanted offenses, such as identity theft.

NEW SECTION. **Sec. 2.** The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

(1) "Enhanced driver's license" means a driver's license that is issued under RCW 46.20.202.

(2) "Enhanced identicard" means an identicard that is issued under RCW 46.20.202.

(3) "Identification document" means an enhanced driver's license or an enhanced identicard.

(4) "Radio frequency identification" means a technology that uses radio waves to transmit data remotely to readers.

(5) "Reader" means a scanning device that is capable of using radio waves to communicate with an identification document and read the data transmitted by the identification document.

(6) "Remotely" means that no physical contact between the identification document and a reader is necessary in order to transmit data using radio waves.

(7) "Unique personal identifier number" means a randomly assigned string of numbers or symbols issued by the department of licensing that is encoded on an identification document and is intended to be read remotely by a reader to identify the identification document that has been issued to a particular individual.

NEW SECTION. **Sec. 3.** (1) Except as provided in subsection (2) of this section, a person is guilty of a class C felony if the person intentionally possesses, or reads or captures remotely using radio waves, information contained on another person's identification document, including the unique personal identifier number encoded on the identification document, without that person's express knowledge or consent.

(2) This section does not apply to:

(a) A person or entity that reads an identification document to facilitate border crossing;

(b) A person or entity that reads a person's identification document in the course of an act of good faith security research, experimentation, or scientific inquiry including, but not limited to, activities useful in identifying and analyzing security flaws and vulnerabilities; or

(c) A person or entity that unintentionally reads an identification document remotely in the course of operating its own radio frequency identification system, provided that the inadvertently received information:

(i) Is not disclosed to any other party;

(ii) Is not used for any purpose; and

(iii) Is not stored or is promptly destroyed.

NEW SECTION. **Sec. 4.** The legislature finds that the practices covered by this chapter are matters vitally affecting the public interest for the purpose of applying chapter 19.86 RCW. A violation of this chapter is not reasonable in relation to the development and preservation of business and is an unfair or deceptive act in trade or commerce and an unfair method of competition for the purpose of applying chapter 19.86 RCW.

Sec. 5. RCW 42.56.230 and 2005 c 274 s 403 are each amended to read as follows:

The following personal information is exempt from public inspection and copying under this chapter:

(1) Personal information in any files maintained for students in public schools, patients or clients of public institutions or public health agencies, or welfare recipients;

(2) Personal information in files maintained for employees, appointees, or elected officials of any public agency to the extent that disclosure would violate their right to privacy;

(3) Information required of any taxpayer in connection with the assessment or collection of any tax if the disclosure of the information to other persons would (a) be prohibited to such persons by RCW 84.08.210, 82.32.330, 84.40.020, or 84.40.340 or (b) violate the taxpayer's right to privacy or result in unfair competitive disadvantage to the taxpayer; ((~~and~~))

(4) Credit card numbers, debit card numbers, electronic check numbers, card expiration dates, or bank or other financial account numbers, except when disclosure is expressly required by or governed by other law; and

(5) Documents and related materials and scanned images of documents and related materials used to prove identity, age, residential address, social security number, or other personal information required to apply for a driver's license or identicard.

Sec. 6. RCW 42.56.330 and 2007 c 197 s 5 are each amended to read as follows:

The following information relating to public utilities and transportation is exempt from disclosure under this chapter:

(1) Records filed with the utilities and transportation commission or attorney general under RCW 80.04.095 that a court has determined are confidential under RCW 80.04.095;

(2) The residential addresses and residential telephone numbers of the customers of a public utility contained in the records or lists held by the public utility of which they are customers, except that this information may be released to the division of child support or the agency or firm providing child support enforcement for another state under Title IV-D of the federal social security act, for the establishment, enforcement, or modification of a support order;

(3) The names, residential addresses, residential telephone numbers, and other individually identifiable records held by an agency in relation to a vanpool, carpool, or other ride-sharing program or service; however, these records may be disclosed to other persons who apply for ride-matching services and who need that information in order to identify potential riders or drivers with whom to share rides;

(4) The personally identifying information of current or former participants or applicants in a paratransit or other transit service operated for the benefit of persons with disabilities or elderly persons;

(5) The personally identifying information of persons who acquire and use transit passes and other fare payment media including, but not limited to, stored value smart cards and magnetic strip cards, except that an agency may disclose this information to a person, employer, educational institution, or other entity that is responsible, in whole or in part, for payment of the cost of acquiring or using a transit pass or other fare payment media, or to the news media when reporting on public transportation or public safety. This information may also be disclosed at the agency's discretion to governmental agencies or groups concerned with public transportation or public safety;

(6) Any information obtained by governmental agencies that is collected by the use of a motor carrier intelligent transportation system or any comparable information equipment attached to a truck, tractor, or trailer; however, the information may be given to other governmental agencies or the owners of the truck, tractor, or trailer

from which the information is obtained. As used in this subsection, "motor carrier" has the same definition as provided in RCW 81.80.010; ((~~and~~))

(7) The personally identifying information of persons who acquire and use transponders or other technology to facilitate payment of tolls. This information may be disclosed in aggregate form as long as the data does not contain any personally identifying information. For these purposes aggregate data may include the census tract of the account holder as long as any individual personally identifying information is not released. Personally identifying information may be released to law enforcement agencies only for toll enforcement purposes. Personally identifying information may be released to law enforcement agencies for other purposes only if the request is accompanied by a court order; and

(8) The personally identifying information of persons who acquire and use a driver's license or identicard that includes a radio frequency identification chip or similar technology to facilitate border crossing. This information may be disclosed in aggregate form as long as the data does not contain any personally identifying information. Personally identifying information may be released to law enforcement agencies only for United States customs and border protection enforcement purposes. Personally identifying information may be released to law enforcement agencies for other purposes only if the request is accompanied by a court order.

NEW SECTION. **Sec. 7.** Sections 1 through 4 of this act constitute a new chapter in Title 9A RCW.

--- END ---

2.04.010 Authority and Purpose.

A. Chapter 42.56 RCW, the Public Records Act ("act"), requires each agency to make available for inspection and copying nonexempt "public records" in accordance with published rules. The act defines "public records" to include any "writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained" by the agency.

B. The purpose of these rules is to establish the procedures Pierce County will follow in order to provide full access to public records. These rules provide information to persons wishing to request access to public records of Pierce County and establish processes for both requesters and Pierce County staff that are designed to best assist members of the public in obtaining such access. These rules have been written to incorporate best practices for compliance with the act and are based upon and organized according to Model Rules promulgated by the Attorney General of the State of Washington. They completely replace the former Chapter 2.04 PCC.

C. The purpose of the act is to provide the public full access to information concerning the conduct of government, mindful of individuals' privacy rights, to protect public records from damage or disorganization and to prevent excessive interference with other essential functions of the agency. The act and these rules will be interpreted in favor of disclosure. In carrying out its responsibilities under the act, Pierce County will be guided by the provisions of the act describing its purposes and interpretation.

D. All County departments, divisions, bureaus, boards, committees, commissions and officers are required to follow these procedures.

(Ord. 2007-76s2 § 1 (part), 2007)

2.04.020 Agency Description – Contact Information – Public Records Officer. Revised 6/15

A. Pierce County is a political subdivision of the State of Washington and an agency subject to the act. The officers, departments, bureaus, boards, committees, commissions, elected officials, and other agencies of the County are also agencies subject to the act, and any person wishing to request access to public records of Pierce County, any agency of Pierce County, or seeking assistance in making such a request shall contact the public records officer of the applicable agency. Records at the judiciary and court files may not be subject to the Public Records Act or to this Ordinance, at least to the extent set forth in Nast v. Michels, 107 Wn.2d 300 (1986) and Spokane & Eastern Lawyer v. Tompkins, 136 Wn.App. 616 (2007), and disclosure of such records may be subject to the common law and to applicable court rules and orders. These rules, therefore, do not address access to court records.

B. Requests for access to public records shall be addressed to the Public Records Officer of the applicable County agency as set forth below:

Agency	Address
Assessor-Treasurer	Rm 142, 2401 S 35th St, Tacoma, WA 98409
Assigned Counsel Dept	949 Market St, Tacoma, WA 98402
Auditor	Rm 200, 2401 S 35th St, Tacoma, WA 98409
Board of Equalization	Rm 176, 2401 S 35th St, Tacoma, WA 98409
Budget and Finance Dept	Ste 100, 615 S 9th St, Tacoma, WA 98405
Civil Service Commission	Ste 200, 615 S 9th St, Tacoma, WA 98405
Clerk of Superior Court	Rm 110, 930 Tacoma Ave S, Tacoma, WA 98402
Community Services Dept	Ste 200, 3602 Pacific Ave S, Tacoma, WA 98418
Corrections Bureau	910 Tacoma Ave S, Tacoma, WA 98402
County Boards	Rm 737, 930 Tacoma Ave S, Tacoma, WA 98402
County Commissions	Rm 737, 930 Tacoma Ave S, Tacoma, WA 98402
County Council	Rm 1046, 930 Tacoma Ave S, Tacoma, WA 98402
County Executive	Rm 737, 930 Tacoma Ave S, Tacoma, WA 98402
Dept of Communications	Rm 737, 930 Tacoma Ave S, Tacoma, WA 98402
Economic Development Dept	Rm 720, 950 Pacific Ave S, Tacoma, WA 98402
Emergency Management Dept	2501 S 35th St, Tacoma, WA 98409
Ethics Commission	Ste 200, 615 S 9th St, Tacoma, WA 98405
Facilities Mgmt Dept	Ste 212, 955 Tacoma Avenue S, Tacoma, WA 98402
Government Relations	Rm 302B, 955 Tacoma Ave S, Tacoma, WA 98402
Human Resources Dept	Ste 200, 615 S 9th St, Tacoma, WA 98402
Human Services Dept	3580 Pacific Ave S, Tacoma, WA 98418
Information Technology Dept	Ste 300, 615 S 9th St, Tacoma, WA 98405
Medical Examiner	3619 Pacific Ave S, Tacoma, WA 98418
Other County Boards	Rm 737, 930 Tacoma Ave S, Tacoma, WA 98402
Other County Bureaus	Rm 737, 930 Tacoma Ave S, Tacoma, WA 98402
Other County Commissions	Rm 737, 930 Tacoma Ave S, Tacoma, WA 98402
Parks & Recreation Services Dept	Ste 121, 9112 Lakewood Dr SW, Lakewood, WA 98499
Personnel Board	Ste 200, 615 S 9th St, Tacoma, WA 98402

Pierce County	Ste 302B, 955 Tacoma Avenue S, Tacoma, WA 98402
Planning & Land Services Dept	Rm 175, 2401 S 35th St, Tacoma, WA 98409
Pierce County Prosecuting Attorney	Ste 301, 955 Tacoma Avenue S, Tacoma, WA 98402
Public Works Dept	Ste 201, 2702 S 42nd St, Tacoma, WA 98409
Risk Management Dept	Ste 303, 955 Tacoma Ave S, Tacoma, WA 98402
Sheriff	930 Tacoma Ave S, Tacoma, WA 98402
Veterans Bureau	Ste 102, 901 Tacoma Ave S, Tacoma, WA 98402

C. A list of name, address, telephone, and fax number of current public records officers for agencies of Pierce County will be posted on the County's website at http://www.co.pierce.wa.us, and copies of that list will be provided upon request by the public records officer for the County designated by the Pierce County Executive to be known as the Pierce County Public Records Ombudsperson, 955 Tacoma Ave S, Ste 302B, Tacoma, WA 98402.

D. The applicable public records officer will oversee compliance with the act but another agency staff member may process the request. Therefore, these rules will refer to the public records officer "or designee." The public records officer or designee will provide the "fullest assistance" to requesters; ensure that public records are protected from damage or disorganization; and prevent fulfillment of public records requests from causing excessive interference with essential functions of Pierce County or its agencies.

(Ord. 2015-25s § 2 (part), 2015; Ord. 2007-76s2 § 1 (part), 2007)

2.04.030 Availability of Public Records.

A. **Hours for Inspection of Records.** Public records are available for inspection and copying during normal business hours of Pierce County and any of its applicable agencies, Monday through Friday, 8:30 a.m. to 4:30 p.m., excluding legal holidays. Records must be inspected at the offices of the public records officer or designee for Pierce County or its applicable agency set forth in PCC 2.04.020 or such other County office designed by the public records officer or designee.

B. **Records Index.** The Pierce County Council finds that maintaining an index is unduly burdensome and would interfere with agency operations for Pierce County and its applicable agencies. The requirement would unduly burden or interfere with Pierce County operations and with that of its applicable agencies because Pierce County employs approximately 3,500 employees who generate hundreds of records on a daily basis that include final opinions and orders made in the adjudication of cases, statements of policy, interpretations of policy, administrative manuals, instructions to staff that affect members of the public, planning policies and goals, interim and final planning decisions, factual staff reports and studies, factual consultant's reports and studies, scientific reports and studies, factual information derived from tests, studies, reports, or surveys, and correspondence and materials referred to therein relating to regulatory,

supervisory, or enforcement responsibilities. Virtually every County department would be required to devote several full-time employees exclusively to the task of collecting, reading, categorizing, indexing, and maintaining a current index of such records. In addition, the time required by other employees to ensure that the records were forwarded to the designated employees for indexing and communicating with the designated employee regarding the purposes of the records would be substantial. Because of the size of Pierce County, the volume and variety of such records and lack of available resources to devote to such an endeavor, creating an index would be unduly burdensome and would unduly interfere with agency operations.

C. **Organization of Records.** Pierce County maintains its records in a reasonably organized manner. Pierce County and each of its agencies will take reasonable actions to protect records from damage and disorganization. A requester shall not take original records from Pierce County offices or that of its agencies. A variety of records is available on the Pierce County web site at http://www.co.pierce.wa.us. Requesters are encouraged to view the documents available on the web site prior to submitting a records request.

D. **Making a Request for Public Records.**

1. Any person wishing to inspect or obtain copies of public records of any Pierce County agency shall make the request in writing on Pierce County's standards request form, by delivery, U.S. mail, or fax, or addressed to the public records officer of the Pierce County agency to which the request is directed. The form shall include the following information:
   a. legal name of requester;
   b. mailing address of requester;
   c. other contact information, including telephone number, fax number, and any e mail address;
   d. reasonable identification of the public records requested adequate for the public records officer or designee to identify and locate the records;
   e. the date and time of day of the request; and
   f. the signature of the requester.
2. Persons seeking public records or information available for inspection and copying from Pierce County may seek assistance from the Pierce County Public Records Ombudsperson. The Public Records Ombudsperson may facilitate identification of records which are available for disclosure and minimize unnecessary effort and cost to the County and to persons seeking available records. The applicable public records officer should provide an information copy of complex public records requests to the Public Records Ombudsperson.
3. If the requester wishes to have copies of the records made, instead of simply inspecting them, he or she shall so indicate and make arrangements to pay for copies of the records or at least make a deposit of 10 percent of the cost of copying estimated by the public records officer or designee before copying will commence. Pursuant to PCC 2.04.070, standard black and white 8½" x 11" photocopies will be provided at 15 cents per page, or if the public records officer to whom the request is made has available for inspection and copying a schedule setting forth the actual cost

of copying the requested records and the factors and manner by which that actual cost has been determined, that actual cost of copying shall be collected instead.

4. Requests shall be made to the selected public records officer upon a standard form promulgated by the Public Records Officer for the County designated by the Pierce County Executive, which shall be made available at the office of each agency's public records officer and on-line at http://www.co.pierce.wa.us/PC/.
5. Persons requesting public records that include a list of individuals will be required to provide a declaration under penalty of perjury certifying sufficient facts from which the public records officer or designee can reasonably determine that the records will not be used for any commercial purpose (profit-expecting activity) prohibited by RCW 42.56.070(9) unless specifically authorized by other law.
6. Persons requesting public records for which other laws limit or prohibit disclosure to a particular class of persons or for limited purposes will be required to provide a declaration under penalty of perjury certifying sufficient facts from which the public records officer of designee can reasonably determine that the legal requirements for disclosure of such records to the requester have been met.

(Ord. 2007-76s2 § 1 (part), 2007)

2.04.040 Processing of Public Records Requests – General.

A. Providing "fullest assistance." Pierce County and each of its agencies is charged by statute with adopting rules which provide for how it will "provide full access to public records," "protect records from damage or disorganization," "prevent excessive interference with other essential functions of the agency," provide "fullest assistance" to requesters, and provide the "most timely possible action" on public records requests. The public records officer or designee will process requests in the order allowing the most requests to be processed in the most efficient manner.

B. **Acknowledging Receipt of Request.** Within five business days of receipt of the request, the public records officer will do one or more of the following:
   1. Make the records available for inspection or copying;
   2. Provide in writing, mailed or delivered to the requester, a reasonable estimate of time when records will be available;
   3. If the request is unclear or does not sufficiently identify the requested records, request clarification from the requester. Such clarification may be requested and provided by telephone, but it is desirable to confirm such clarifications in writing. The public records officer or designee may revise the estimate of when records will be available; or
   4. Deny the request, in whole or in part.

C. **Consequences of Failure to Respond.** If the County or its applicable agency does not respond in writing within five business days of receipt of the request for disclosure, the requester should contact the public records officer to determine the reason for the failure to respond.

D. **Protecting Rights of Others.** In the event that the requested records contain information that may affect rights of others and may be exempt from disclosure, the public records

officer or designee may, prior to providing the records, give notice to such others whose rights may be affected by the disclosure. Such notice should be given so as to make it possible for those other persons to contact the requester and ask him or her to revise the request or, if necessary, to seek an order from a court to prevent or limit the disclosure. The notice to the affected persons will include a copy of the request.

E. **Records Exempt or Prohibited from Disclosure.** Some records are exempt from or are prohibited from disclosure by law, in whole or in part. If Pierce County or its applicable agency believes that a record is exempt from or prohibited from disclosure and should be withheld, the public records officer or designee will state the specific exemption or prohibition under which the record or a portion of the record is being withheld. If only a portion of a record is exempt or prohibited from disclosure but the remainder is not exempt or prohibited, the public records officer will redact the exempt or prohibited portions, provide the nonexempt portions, and indicate to the requester why portions of the record are being redacted.

F. **Inspection of Records.**

1. Consistent with other demands, Pierce County or its applicable agency shall promptly provide space to inspect public records. No member of the public may remove a document from the viewing area or disassemble or alter any document. The requester shall indicate which documents he or she wishes the agency to copy.
2. The requester must claim or review the assembled records within 30 days of the County's or its applicable agency's notification to him or her that the records are available for inspection or copying. The agency will notify the requester in writing of this requirement and inform the requester that he or she should contact the agency to make arrangements to claim or review the records. If the requester or a representative of the requester fails to claim or review the records within the 30-day period or make other arrangements satisfactory to the County or its applicable agency, the County or its applicable agency may close the request and refile the assembled records. Other public records requests can be processed ahead of a subsequent request by the same person for the same or similar records, which can be processed as a new request.

G. **Providing Copies of Records.** After inspection is complete, the public records officer or designee shall make the requested copies or arrange for copying upon a deposit of at least 10 percent of the estimated cost of copying.

H. **Providing Records in Installments.** When the request is for a large number of records, the public records officer or designee will provide access for inspection and copying in installments, if he or she reasonably determines that it would be practical to provide the records in that way. If, within 30 days, the requester fails to inspect the entire set of records or one or more of the installments after being made available, or to pay the balance of the cost of copying of records copied or those copied in an installment, the public records officer or designee may stop searching for the remaining records and close the request.

I. **Completion of Inspection.** When the inspection of the requested records is complete and

all requested copies are provided, the public records officer or designee will indicate that Pierce County or its applicable agency has completed a diligent search for the requested records and made any located non-exempt records available for inspection.

J. **Closing Withdrawn or Abandoned Request.** When the requester either withdraws the request or fails to fulfill his or her obligations to inspect the records or pay the deposit or final payment for the requested copies, the public records officer will close the request and indicate to the requester that Pierce County or its applicable agency has closed the request. Subsequent copies requested may not be made until the requester has paid any unpaid bill for copying services requested by the requester, whether or not the copies previously made have been retained for the requester or destroyed when the previous bill remained unpaid for more than 30 days after notice mailed to the requester.

K. **Later Discovered Documents.** If, after Pierce County or its applicable agency has informed the requester that it has provided all available records, Pierce County or its applicable agency becomes aware of additional responsive documents existing at the time of the request, it will promptly inform the requester of the additional documents and provide them on an expedited basis.

L. **Protection of Records and Functions.**

1. Public records shall be made available without disrupting essential functions of the offices. Any County employee who believes that response to public records requests will excessively interfere with other essential agency functions shall consult with his or her supervisor.
2. An agency may follow a reasonable schedule regarding retrieval of a record from an off-premises storage site so that no more than one trip per week to the remote site is required.
3. With regard to copying, prearrangement is recommended so that it can be accommodated within the work schedule. Copies shall be made only by a staff member. The precise time must remain flexible and will depend upon the work schedule for that day.
4. **With regard to video or audio recordings, prior arrangements must be made for review.** A staff member will be assigned to operate the County recording equipment necessary to either listen to or rerecord the original recording tape to protect originals. The public records officer may limit the maximum time allowed during any working day for supervised review to avoid excessive interference with the agency's other essential functions. If the agency is able to provide access which excludes the requester from access to original records which might be damaged or disorganized and from access to originals or copies prohibited or exempt from disclosure, additional time may be made available.
5. Review of other original records shall be done only in the immediate presence of and under the supervision of a County employee responsible for protecting the originals against damage, alteration, or disorganization by the requester. The public records officer may limit the maximum time allowed during any working day for supervised review to avoid excessive interference with the agency's other essential functions.

When the time needed for this purpose exceeds two hours, time periods on a future day or days may be assigned. If the agency is able to provide access which excludes the requester from access to original records which might be damaged or disorganized and from access to originals or copies or exempt from disclosure, additional time may be made available.

(Ord. 2007-76s2 § 1 (part), 2007)

2.04.050 [Reserved]

(Ord. 2007-76s2 § 1 (part), 2007)

2.04.060 Exemptions.

The Public Records Act provides that a number of types of documents are exempt from public inspection and copying. In addition, documents are exempt from disclosure if any "other statute" exempts or prohibits disclosure. Exemptions outside the Public Records Act that restrict the availability of some documents held by Pierce County or its applicable agencies for inspection and copying include, but are not limited to, those set forth for counties and municipalities in the most recent list of other such statutes posted on the web site of the Municipal Research Service Center, which is present www.mrsc.org/Publications/pra06.pdf, Appendix C, and which is incorporated herein by reference. The list is available for inspection and copying from the applicable public records officer.

Pierce County and its agencies are prohibited by statute from disclosing lists of individuals for commercial purposes.

(Ord. 2007-76s2 § 1 (part), 2007)

2.04.070 Costs of Providing Copies of Public Records.

A. **Costs Required for Inspection.** There is no fee for inspecting public records. There is no fee for the staff time necessary to prepare the records for inspection, for the copying required to redact records before they are inspected, or an archive fee for getting the records from off-site. The costs of making the records available for inspection or copying are not charged to the requester.

B. **Costs for Copies.** A requester may obtain standard 8½" x 11" black and white photocopies for 15 cents per page. If the actual cost of copying is determined by the County or by the applicable agency to be other than 15 cents per page, that charge may be collected if a statement of the factors and the manner used to determine this charge is available from the public records officer or designee. Before beginning to make these copies, the public records officer or designee may require a deposit of 10 percent of the estimated costs of copying all the records selected by the requester. The public records officer or designee shall require the payment of the remainder of the copying costs for those copies before providing them to the requester, whether they include all of the records or an installment. Pierce County and its agencies do not charge sales tax when they make copies of public records. The Department of Budget and Finance shall assist agencies in determining the factors and manner of calculating the actual cost of copying.

C. **Costs for Electronic Records.** The cost of electronic copies of records shall be the

amount per hour for copying information on a CD-ROM or other media, plus the listed cost for each CD-ROM or other media as set forth in the statement of the factors and manner used to determine this charge available from the applicable public records officer. The Department of Budget and Finance shall assist agencies in determining the factors and manner of calculating the actual cost of copying.

D. **Costs of Mailing.** Pierce County or its applicable agency may also charge actual costs of mailing, including the cost of the shipping container or envelope if the requester requests mailing or shipping.

E. **Payment.** Payment may be made by cash, check or money order to Pierce County.

F. **Waiver of Payment.** Pierce County or its applicable agency may waive the cost of copying if the cost is less than the cost of processing payment as determined by the Director of Budget and Finance.

G. **Charges Required by Other Statutes.** If a different charge for copies or certification is required to be collected by a statute other than the Public Records Act, such as RCW 36.18, RCW 46.52.085 or RCW 10.97.100, the provisions of that statute shall govern.

H. **Outside Contracts for Copying.** The applicable agency may arrange for copying by County contractors charged with preserving and protecting public records, instead of copying requested records using County services. In such event, the cost of copying charged shall be the contract charges, and such charges shall be paid by the requester directly to the County contractor who performed the copying. If the requester made a deposit in advance of copying, any unapplied portion of the deposit will be refunded to the requester, provided that the contract charges are paid and the copies are picked up by the requester within 30 days after written notice of the unpaid contract charges is mailed to the requester's address.

I. **Repetitive Contracts.** The County Executive may enter into contractual agreements with persons who intend to request access to public records available for disclosure to them on a continuous or regularly recurring basis. The terms of any contract executed in accordance with this Section will supersede and control over any otherwise applicable provisions of this Chapter.

(Ord. 2007-76s2 § 1 (part), 2007)

2.04.075 Disposition of Funds.

Money received for copies shall be receipted and deposited as set forth in Cashiering Procedures promulgated by the Department of Budget and Finance. (Ord. 2007-76s2 § 1 (part), 2007)

2.04.080 Review of Denials of Public Records.

A. **Petition for Internal Administrative Review of Denial of Access.** Any person who objects to the initial denial or partial denial of a records request may petition in writing to the public records officer or designee for a review of that decision. The petition shall include a copy of or reasonably identify the written statement by the public records officer or designee denying the request.

B. **Consideration of Petition for Review.** The public records officer or designee shall

promptly provide the petition and any other relevant information to the public records officer's supervisor or other officials designated by the agency to conduct the review, who shall immediately consult with the Prosecuting Attorney before action on the petition. That person will immediately consider the petition and either affirm or reverse the denial within two business days following the agency's receipt of the petition, or within such other time as is mutually agreeable to Pierce County and the requester.

C. **Judicial Review.** Any person may obtain judicial review of a public records request denial pursuant to RCW 42.56.550 at the conclusion of two business days following the initial denial regardless of any internal administrative appeal.

(Ord. 2007-76s2 § 1 (part), 2007)

2.04.090 Access to Public Records.

The providing of public records shall be governed by the following procedures:

A. Each administrative department shall adopt and enforce reasonable rules regarding retrieval and public inspection of records. Public records shall be made available without disrupting essential functions of the offices. Any County employee who believes that essential functions will be interrupted shall consult with his or her supervisor.

B. An agency may adopt reasonable rules regarding retrieval of a record from an off-premises storage site so that no more than one trip per week to the remote site is required.

C. Any request made to the Microfilm Department for a public record shall be made by the department whose records are requested. Requests for microfilm records by persons other than those authorized by the originating department shall not be honored.

D. Duplicate, carbon copy or other secondary records are to be dealt with in the same manner as the original or primary copy.

E. With regard to photocopying, prearrangement for copies of records is recommended so that they can be accommodated within the work schedule. Copies shall be made only by a staff member once each day. The precise time must remain flexible and will depend upon the work schedule for that day. However, copying will be done between 2 p.m. and 3 p.m. whenever possible. Copies may be picked up later in the afternoon or the next day. When a special machine warm-up, set-up, or trip outside the immediate area is required, the requested copies shall be run along with regular department work. If such measures are necessary, copies will be provided by the end of the following business day, unless the record requested must be retrieved from a site off-premises.

F. With regard to other printing, Ozalid, Sepia, blueprints, or photostatic copies of maps, graphs, charts, etc., which cannot be produced within the office will be forwarded to the appropriate County department or outside business. The requestor will be billed directly by the printer. This will be performed once each day in a manner similar to photocopying.

G. With regard to tape recordings, prior arrangements must be made to listen to or copy a tape recording. A staff member will be assigned to operate the County recording equipment necessary to either listen to or rerecord the original tape. To maintain the department's and individual's work schedule, two hours shall be the maximum time allowed during any working day for this purpose. When the time needed for this purpose

exceeds two hours, time periods on future day or days will be assigned.

H. With regard to the production of transcripts, not more than two hours each working day shall be expended by the transcriber. Time periods shall be adjusted daily to fit the normal work schedule.

(Ord. 2007-76s2 § 1 (part), 2007)

PIERCE COUNTY PROSECUTOR

December 23, 2016 - 10:54 AM

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Cost Bill

Objection to Cost Bill

Affidavit

Letter

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Statement of Arrangements

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Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

■ Other: Appendix

Comments:

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